TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 148.

NATHANIEL W. HOBBS, TRUSTEE, APPELLANT,

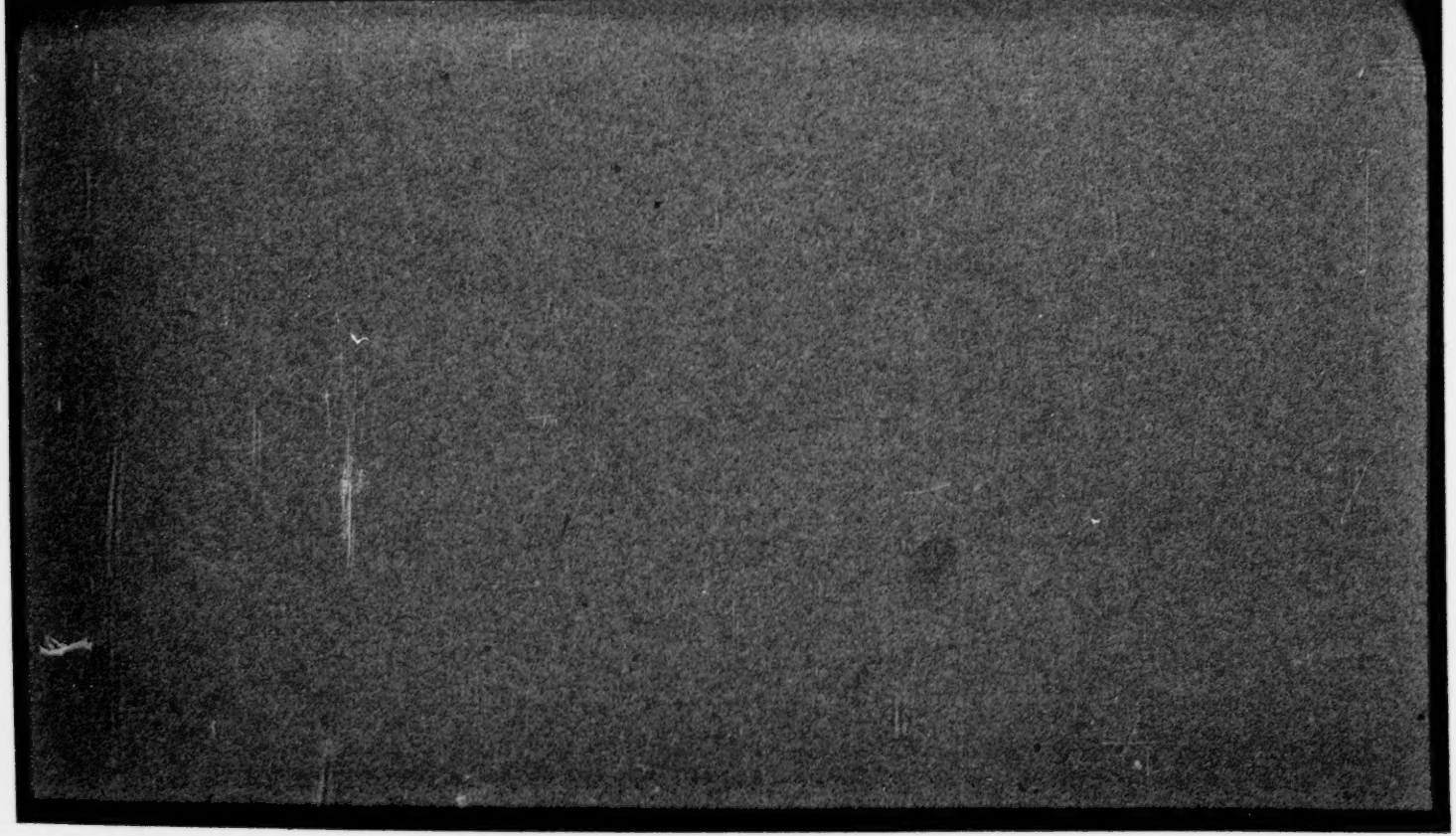
vs.

HEAD & DOWST COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED DECEMBER 26, 1931.

(22,930)



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a United States Circuit Court of Appeals for the First Circuit, October Term, 1909.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Appeal from the District Court of the United States for the District of New Hampshire, from Decree (Aldrich, J.), March 19, 1910.

Transcript of Record.

Henry F. Hollis, For Appellant.
George H. Warren, Burnham, Brown, Jones & Warren, for Appellee.

Boston: Printed under direction of the Clerk, 1910.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1909.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

[Filed in Circuit Court of Appeals April 4, 1910.]

(1) *Petition of Trustee to Stay Pending Suit of Head & Dowst Company.*

[Filed April 14, 1908.]

*District Court of the United States for the District of New Hampshire.

No. 1253.

In re THE NEW ENGLAND BREEDERS' CLUB, Bankrupt.

Your petitioner, Nathaniel W. Hobbs, of Concord, in said district, respectfully shows that the New England Breeders' Club was

*The heading—the Court and Title of the Case—being repeated on papers numbered (2), (3), (4), (5), (6), (7), (8), (9) and (11) is omitted in printing them.—FRANCIS M. FOGARTY, *Clerk*.

duly adjudged a bankrupt herein on the thirty-first day of December, 1907, upon a petition filed the nineteenth day of April, 1907, and your petitioner, said Nathaniel W. Hobbs, was, on the first day of February, 1908, appointed and duly qualified as trustee of the estate of said New England Breeders' Club, in bankruptcy, and is now acting as said trustee, and is in possession of certain real estate and personal property, being all of the estate of said bankrupt.

2 That among the debts scheduled by said bankrupt proceedings, is one for forty-six thousand dollars ($46,000), stated to be due the Head & Dowst Company, a corporation by law established, a citizen of said District of New Hampshire, and a resident of Manchester in said District of New Hampshire, and that such debt is of such a nature as may entitle said Head & Dowst Company to a mechanics' lien, under the New Hampshire statute;

That at the time of the filing of the petition upon which said adjudication in bankruptcy was made, a special attachment had been made by said Head & Dowst Company upon the real estate of said New England Breeders' Club at Salem, in said district, to wit, the twenty-fourth day of December, 1906, for the avowed purpose of securing an alleged lien of said Head & Dowst Company upon said real estate, but no suit to enforce said lien had at that time been entered in court;

That subsequently, on, to wit, the seventh day of May, 1907, said Head & Dowst Company entered in the Superior Court for the county of Hillsborough and State of New Hampshire, a suit against said New England Breeders' Club, founded upon the debt aforesaid, for the express purpose of enforcing and foreclosing its alleged lien, and ever since has prosecuted said suit for said purpose in said Superior Court and in the Supreme Court, without the permission of this Honorable Court, and without making your petitioner a party to said suit;

That said Head & Dowst Company is not justly and legally entitled to maintain and enforce its alleged lien upon said real estate, and any pretended right which it may have is founded upon the aid and connivance of agents and servants of said New England Breeders' Club in order to secure to said Head & Dowst Company an unlawful preference in fraud of the Federal bankruptcy law, and to the great injury of the other creditors of said bankrupt, secured and unsecured;

That your petitioner would be greatly hindered and embarrassed in making a proper defence to said suit in said Superior Court and said Supreme Court, and would be unable to properly avail himself of the provisions of the Federal bankruptcy law with regard to unjust preferences, and if said suit is permitted to continue in said Superior Court and said Supreme Court, your petitioner is

3 likely to be hindered and embarrassed in his possession of said bankrupt estate, and be ousted from his possession thereof;

That said Head & Dowst Company are seeking to obtain judgment against your petitioner as an officer of this Honorable Court, and to that end are seeking to compel him to appear in said Superior Court, and also in said Supreme Court of the State of New Hamp-

shire, and to become a party defendant to their suit in order that his rights in said real estate as an officer of this court may be foreclosed and adjudicated in favor of said Head & Dowst Company;

That if such suit is not staid your petitioner will be compelled to become a party to said suit in said State courts, or to permit a judgment in rem, to be obtained by default against said real estate, so that great and irreparable injury will be done your petitioner as an officer of this Honorable Court, and the other creditors of said bankrupt, and the estate of said New England Breeders' Club.

Wherefore, your petitioner prays that further proceedings in said Superior and said Supreme Courts of New Hampshire may be staid, pursuant to the bankruptcy laws of the United States in such cases made and provided, and that an injunction may be issued out of this Honorable Court, directed to said Head & Dowst Company, restraining it, its agents, servants, attorneys and counsellors, from further prosecuting said suit in said courts, and for such other and further relief as to the court may seem just.

NATHANIEL W. HOBBS,
Trustee, Petitioner.

STATE OF NEW HAMPSHIRE,
County of Merrimack, ss:

I, Nathaniel W. Hobbs, the petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statements of facts contained herein are true to the best of my knowledge, information and belief.

NATHANIEL W. HOBBS.

Subscribed and sworn to, before me, this thirteenth day of April, 1908.

EDWARD J. CUMMINGS,
Justice of the Peace.

4 (2) *Petition of Trustee for a Temporary Restraining Order.*

[Filed May 13, 1908.]

A petition for a restraining order against the Head & Dowst Company, to stay a suit pending in the courts of the State of New Hampshire, having been filed with the clerk of this Honorable Court on the fourteenth day of April, 1908, your petitioner respectfully shows that said Head & Dowst Company are likely to take judgment and levy an execution against said bankrupt estate, or take possession thereof by process of law, before the hearing of said petition, unless the said defendants are, pending such hearing, restrained therefrom.

Wherefore, your petitioner moves this Honorable Court to grant a temporary restraining order against said Head & Dowst Company, it- agents, servants, attorneys and counsellors, from taking further action in said suit before the hearing of said petition, or

until the further order of the court, conformable to the prayer of said petition.

NATHANIEL W. HOBBS,
Trustee, Petitioner.

STATE OF NEW HAMPSHIRE,
County of Merrimack, ss:

I, Nathaniel W. Hobbs, the petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statements of facts contained herein are true to the best of my knowledge, information and belief.

NATHANIEL W. HOBBS.
Trustee, Petitioner.

Subscribed and sworn to, before me, this thirteenth day of May, 1908.

EDWARD J. CUMMINGS,
Justice of the Peace.

(3) *Temporary Restraining Order.*

May 15, 1908.

Whereas, in the above cause, a motion for the issuance of a permanent restraining order has been filed and it having appeared that there is danger of irreparable injury being caused to the petitioner before the hearing of said application for the permanent restraining order unless said Head & Dowst Company is, pending such hearing, restrained as herein set forth.

Now, therefore, take notice that you, the Head & Dowst Company, defendant herein, your agents, servants, attorneys and counsellors, and each of you, are hereby specially restrained and enjoined from taking further action in the suit of Head & Dowst Company v. New England Breeders' Club, now pending in the Superior Court and the Supreme Court for the State of New Hampshire, to enforce a lien upon the real estate of said New England Breeders' Club, until further order of this court in the premises. I will hear the Head & Dowst Company under special appearance, and without prejudice as to any question of jurisdiction upon reasonable notice to the other side, upon an application to dissolve this order. It is intended that the party restrained need not necessarily resort to a motion to dissolve, but may at once exercise the right of appeal. In the meantime, and without prejudice to the right of either party, the trustee has leave to co-operate with the Head & Dowst Company with a view of selling the property in dispute, and in case of sale upon joint consent the proceeds will be safeguarded and held until the rights of the parties are established by law.

EDGAR ALDRICH,
U. S. District Judge.

Done at Chambers May 15, 1908.

(4) *Trustee's Petition to Adjudicate Adverse Claim.*

[Filed June 10, 1908.]

Your petitioner, Nathaniel W. Hobbs, of Concord, in said district, trustee in bankruptcy of the estate of the New England Breeders' Club, respectfully represents that he was appointed and duly qualified as trustee of said bankrupt estate on the eighth day of February, 1908, and thereupon he came into possession of a certain tract of land with the buildings thereon situate in said Salem, southerly of Salem Depot, so called, and lying on both sides
6 of Pleasant Street, being bounded and described as follows:—

Beginning on the southerly side of Main Street at the northeasterly corner of land of A. M. Wade; thence easterly by said Main Street to Central Street; thence southerly by said Central Street to a bound at its southerly end; thence easterly by the end of said Central Street, by land of James H. Hadley and by land of Frank P. Woodbury to the Manchester & Lawrence Railroad; thence southerly by said railroad to a point on said railroad opposite the southwesterly corner of land of George E. Kline; thence easterly, crossing said railroad and by said Kline land to the Londonderry Turnpike, so called; thence southerly by said Turnpike to land of John Brista; thence westerly by said Brista land crossing said railroad; thence southerly by said railroad to a highway at Cluff's Crossing, so called; thence westerly by said highway to land of John Brista; thence northwesterly by said Brista land to the center of Policy Brook; thence southerly and westerly by the center of said brook to the line of land of David Hird; thence westerly, southwesterly and southerly by the center of said brook to its junction with Hedgehog Brook; thence westerly, nortwesterly and westerly by said Hedgehog Brook to the highway leading from School House No. 8 to the homestead of Ezra B. Hall; thence northerly by said highway to said Pleasant Street; thence northeasterly by said Pleasant Street to a point opposite the southeasterly corner of land of said Ezra B. Hall; thence crossing said Pleasant Street and running northerly, then westerly by said Hall land to land of J. Fred Blethen; thence northerly, thence westerly by said Blethen land to the highway leading from the homestead of said Ezra B. Hall to the homestead now or formerly of J. Taylor; thence northerly by said highway to land of Lester L. Hall; thence easterly by said Hall land and land of Mary N. Kelley to said Pleasant Street; thence crossing said Pleasant Street and running northerly by said Pleasant Street to land of said A. M. Wade; thence easterly, thence northerly by said Wade land to the point of beginning. Being all the real estate of said bankrupt.

And your petitioner has ever since remained in possession of said real estate, and is now in possession thereof as an officer of this Honorable Court, and that the title to said real estate is now vested
7 by operation of law in your petitioner as trustee in bankruptcy, as aforesaid;

That the Head & Dowst Company, a corporation by law established, a citizen of said District of New Hampshire, and a resident of Manchester in said district, claims to have acquired and to hold a mechanics' lien upon all of said real estate, on account of materials furnished and labor performed in erecting buildings on said real estate, and a performance of all necessary acts to entitle it to a lien under the mechanics' lien laws of said State of New Hampshire;

That said Head & Dowst Company is not lawfully entitled to a lien upon said property in as much as it has not complied with the terms of said mechanics' lien laws of said State of New Hampshire, and because its claim to such lien is based upon certain unauthorized and fraudulent waivers and admissions made by said bankrupt, its agents and officers, and certain preferences and advantages which were given to said Head & Dowst Company in fraud of the Federal bankruptcy laws; and if said lien should be established it would be a fraud upon your petitioner and the general creditors of said bankrupt, and contrary to the provisions of said Federal bankruptcy law;

That said pretended claim of said Head & Dowst Company constitutes a cloud upon the title of said real estate, and in order properly to administer the estate of said bankrupt, and to sell said real estate to the best advantage, it is necessary to ascertain whether said Head & Dowst Company has acquired such lien, or any lien, and, if so acquired, the amount and extent thereof.

Wherefore, your petitioner prays that said Head & Dowst Company may be ordered to appear and show the validity and the amount of its said lien, if any it may have, in the premises hereinbefore described, and that if the said Head & Dowst Company shall fail to appear, its lien, if any, may be discharged, and that said Head & Dowst Company may be forever debarred from asserting said lien in any court; and for such further relief as may seem proper and equitable in the premises, according to the practice of this Honorable Court.

NATHANIEL W. HOBBS,
Trustee, Petitioner.

8 STATE OF NEW HAMPSHIRE,
County of Merrimack, ss:

I, Nathaniel W. Hobbs, the petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statements of facts contained herein are true to the best of my knowledge, information and belief.

NATHANIEL W. HOBBS.

Subscribed and sworn to, before me, this tenth day of June, 1908.

EDWARD J. CUMMINGS,
Justice of the Peace.

(5) *Petition of Head & Dowst Company.*

[Filed June 11, 1908.]

The Head & Dowst Company, a corporation duly established by law and doing business in the county of Hillsborough, in said State, under special appearance in the above-entitled cause and without prejudice as to any question of jurisdiction or otherwise, respectfully represents that on the twenty-fourth day of December, 1906, it brought an action against said club, to secure and enforce its lien claim for labor and materials, in the Superior Court for the county of Hillsborough, in said State, returnable at the May, 1907, Term thereof, attaching on said day the real estate of said club for that purpose; that on the fifth day of February, 1907, certain creditors of said club filed a petition in the Probate Court for the county of Rockingham, in said State, asking for a decree of insolvency against said club, and that said club be declared an insolvent debtor under and by virtue of the New Hampshire insolvency law, so called, existing prior to the passage of the United States bankruptcy law; that said Probate Court assumed jurisdiction and decreed said club an insolvent debtor March 1, 1907, and on the fifteenth day of April, 1907, appointed Nathaniel W. Hobbs, of Concord, New Hampshire, assignee thereof; that said company caused its writ on its aforesaid action to be served upon said Hobbs and upon Henry F. Hollis, clerk of said club, on the nineteenth day of April, 1907, notifying them of the pendency of said action and to appear and defend the same at said May Term, 1907, which they did, and continued to appear and defend said club before and at the trial of said action in December, 1907;
9 that on the eighteenth day of December, 1907, the judge of said Superior Court, before whom said action was tried, filed his findings in said court, awarding said company $46,748.08 and a judgment in rem against all the real estate of said club attached in said action; that afterward, upon request of said club and the assignee thereof, in consequence of exceptions taken at said trial, a case was drawn covering all exceptions taken at the trial aforesaid, and the same was transferred to the Supreme Court for said State; that on the eighth day of May, 1908, said exceptions were overruled by said Supreme Court; that on a petition filed April 19, 1907, in the District Court of the United States for the District of New Hampshire, but which was not acted upon until after December 18, 1907, said club was adjudicated a bankrupt by said District Court December 31, 1907, and said Nathaniel W. Hobbs was appointed trustee in bankruptcy of said club February 1, 1908; that on the fourteenth day of April, 1908, said Hobbs, as trustee in bankruptcy of said club, filed in said District Court a petition for a restraining order against said company from taking further action in its said suit in the New Hampshire State court; that said company was not duly notified of said petition, and has never appeared in person or by counsel in said bankruptcy court or in said State insolvency court; that on the fifteenth day of May, 1908, said District Court tem-

porarily restrained and enjoined said company "from taking further action in the suit of Head & Dowst Co. v. New England Breeders' Club, now pending in the Superior Court and the Supreme Court for the State of New Hampshire, to enforce a lien upon all real estate of said New England Breeders' Club, until further order of this court in the premises"; that it was further stated in said order, "I will hear the Head & Dowst Company under special appearance and without prejudice as to any questions of jurisdiction upon reasonable notice to the other side, upon an application to dissolve this order."

Your petitioner herewith requests an order of notice to be issued to the other side, returnable at such reasonable time as the court may order, for a full hearing upon all questions of fact and law involved in the right of said company to have said temporary restraining order dissolved. And said company, under said special appearance and without prejudice as to any questions of jurisdiction as granted by said District Court, says that said club was, and always has been, an amusement corporation, and that said District Court has not and cannot have any jurisdiction thereof.

THE HEAD & DOWST COMPANY,
By Its Attorneys, BURNHAM, BROWN, JONES & WARREN.
GEO. H. WARREN.

(6) *Answer of Head & Dowst Company to the Petition of April 14, of Hobbs, Trustee, to Stay Pending Suit.*

[Filed March 18, 1909.]

The defendant under special appearance now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:—

1. That on the twenty-fourth day of December, 1906, it brought an action against said club, to secure and enforce its lien claim for labor and materials, in the Superior Court for the county of Hillsborough, in said State, returnable at the May, 1907, Term thereof, attaching on said day the real estate of said club for that purpose; that on the fifth day of February, 1907, certain creditors of said club filed a petition in the Probate Court for the county of Rockingham, in said State, asking for a decree of insolvency against said club and that said club be declared an insolvent debtor under and by virtue of the New Hampshire insolvency law, so called, existing prior to the passage of the United States bankruptcy law; that said Probate Court assumed jurisdiction and decreed said club an insolvent debtor March 1, 1907, and on the fifteenth day of April, 1907, appointed Nathaniel W. Hobbs, of Concord, New Hampshire, assignee thereof; that said company caused its writ on its aforesaid action to be

served upon said Hobbs and upon Henry F. Hollis, clerk of
11 said club on the nineteenth day of April, 1907, notifying
them of the pendency of said action and to appear and defend the same at said May Term, 1907, which they did, and continued to appear and defend said club before and at the trial of said action in December, 1907; that on the eighteenth day of December, 1907, the judge of said Superior Court, before whom said action was tried, filed his findings in said court awarding said company $46,748.08 and a judgment in rem against all the real estate of said club attached in said action; that afterward, upon request of said club and the assignee thereof, in consequence of exceptions taken at said trial, a case was drawn covering all exceptions taken at the trial aforesaid and the same was transferred to the Supreme Court for said State; that on the eighth day of May, 1908, said exceptions were overruled by said Supreme Court; that on a petition filed April 19, 1907, in the District Court of the United States for the District of New Hampshire, but which was not acted upon until after December 18, 1907, said club was adjudicated a bankrupt by said District Court December 31, 1907, and said Nathaniel W. Hobbs was appointed trustee in bankruptcy of said club February 1, 1908.

2. That the opinion of the Supreme Court of New Hampshire, filed May 8, 1908, is as follows, to wit:

No. 655.

HEAD AND DOWST
v.
N. E. BREEDERS' CLUB.

Per Curiam:

This is a proceeding to perfect and enforce a lien claim against certain property of the defendants. The case was heard by the Superior Court and certain orders made in favor of the plaintiffs. To these orders exceptions were taken which were transferred to this court for determination. Prior to the hearing in the Superior Court, proceedings began under the State insolvency statute, and an assignee was appointed, who took possession of the property of the defendant club and appeared by counsel and contested the action in the Superior Court. In due course a brief was filed in this court in the name of the defendants by counsel who represented the assignee in the Superior Court, but the defendants made no appearance in that court. When the same came on for argument, counsel filing the brief stated that the defendants did not appear and that the assignee in insolvency had surrendered the property to a trustee appointed in
proceedings in bankruptcy in the Federal court and had been
12 discharged as assignee. It also appeared that counsel for other
parties claiming liens on the property had entered appearances on the docket, but it did not appear that they had ever been admitted to defend the proceeding or had established any interest except that of general creditors represented either by the assignee in insolvency or the trustee in bankruptcy. In this situation the court declined to con-

sider the exceptions until the bankruptcy proceedings should be dismissed or the trustee in bankruptcy be made a party, and the case was postponed to the next session. Before the next session the plaintiffs obtained and served upon the trustee in bankruptcy an order notifying him of the pendency of the proceedings. Upon the return of this notice at the next session of the court counsel for the trustee in bankruptcy appeared specially, being the same counsel who had previously appeared for the assignee, and it being brought to the attention of the court that such counsel had requested to be notified of an application for an order of notice so that he might be heard thereon which request by accident was not brought to the attention of the court, the court ruled that counsel could then be heard upon the question whether an order of notice should be issued. Counsel thereupon appearing specially in behalf of the trustee made a statement for the information of the court but declined to make any motion or suggestion as to the proper procedure or to object to the issuance of an order of notice. It appeared from the statements of counsel that prior to the hearing in the Superior Court, a petition in bankruptcy had been filed in the Federal court, but no further action had been taken thereon and that the proper-y remained in the possession of the assignee until after the hearing, and that the same person who was assignee and held the property under the proceedings in the State court has been appointed trustee in bankruptcy; that the situation of the property is such that the question of title raised by plaintiff's claim of lien should be promptly adjudicated.

While no suggestion or motion was made by counsel for the trustee he requested two weeks' time in case an order of notice was made to determine what action he should take in the premises.

In the foregoing situation it seems clear that the trustee in bankruptcy has full knowledge of the existence of the plaintiff's claim and the progress of the litigation by which they are seeking to enforce it. Neither the assignee in insolvency or the attaching creditors have now any standing in court. The trustee in bankruptcy does not appear. As no person appears to sustain the exceptions they are overruled without consideration and the case remanded to the Superior Court. As under the statute the orders of this court are not transmitted until thirty days after they are filed an
13 application by the trustee for leave to appear and to make such motions as he may be advised are proper to protect his interest, if any, in the subject-matter of the suit will be entertained if made and filed on or before May twenty-second. The legal effect, if any, of the trustee's right to the property of a failure on his part for any reason to appear in this proceeding is not now before the court and has not been considered.

Exceptions overruled nisi.

BURNHAM, BROWN, JONES & WARREN,
For the Plaintiffs.

HENRY F. HOLLIS,
Specially for Nathaniel W. Hobbs, Trustee in Bankruptcy.

3. Said Head & Dowst Company says that it is justly and legally entitled to maintain and enforce its lien verdict obtained in the Superior Court of New Hampshire; that its right to a lien upon the property of said club was not obtained and is not founded upon the aid and connivance of agents and servants of said club and is not an unlawful preference of the Federal bankruptcy law, or of any law.

4. Said Head & Dowst Company denies that said club, or any legal representative thereof, has been or could be hindered and embarrassed in making a proper defence to said lien suit, either in the Superior Court or the Supreme Court of New Hampshire.

5. Said Head & Dowst Company says that neither the petitioner herein nor any one has any legal or equitable right to stay the proceedings of the Head & Dowst Company in its suit pending in the Superior Court or the Supreme Court of New Hampshire.

6. Said Head & Dowst Company says that it has never filed or proved any claim in its behalf against said club, either in the insolvency court for the State of New Hampshire or in said District Court, or appeared therein in any proceedings except in this proceeding under special appearance.

Wherefore, said Head & Dowst Company prays that the petitioner's petition and all proceedings thereunder may be dismissed with reasonable costs and charges to said Head & Dowst Company.

THE HEAD & DOWST COMPANY,
By JOHN DOWST, *Treasurer.*

14 STATE OF NEW HAMPSHIRE,
Hillsborough, ss:

MARCH 17, 1909.

I, John Dowst, treasurer of the within-named Head & Dowst Company, do hereby make solemn oath that the statement of facts herein are true to the best of my knowledge, information and belief.

JOHN DOWST.

Subscribed and sworn to before me this seventeenth day of March, 1909.

FRANK A. CADWELL,
Justice of the Peace.

(7) *Order of Court Appointing Master.*

April 29, 1909.

ALDRICH, *J.:*

On this twenty-ninth day of April, 1909, this cause coming on for further consideration, upon consent of the parties, It is ordered that Burns P. Hodgman be, and he hereby is, appointed Master to find and report to the court the material facts relative to the validity of the alleged Head & Dowst lien in the bankruptcy sense.

By the Court:

BURNS P. HODGMAN, *Clerk.*

(8) *Order of Court.*

August 10, 1909.

ALDRICH, *J.:*

Hearing upon question as to scope of order of April 29, 1909.

It is ordered that the master hear all material evidence relative to matters alleged in petition of June 10 and June 11, 1908, and that Head & Dowst Company go forward upon the question of the validity of their alleged lien.

Head & Dowst Company except to this order so far as it relates to the petition of June 10, 1908, upon the ground that the company has never appeared under that petition, or generally, in the bankruptcy proceeding, and that their only appearance has been special in respect to the restraining order. Head & Dowst Company also except to that part of the order directing Head & Dowst Company to go forward.

By the Court:

BURNS P. HODGMAN, *Clerk.*

(9) *Report of Burns P. Hodgman, Master.*

[Filed December 6, 1909.]

Having been appointed master to find and report the facts relative to the petitions of June 10 and June 11, 1908, I gave reasonable notice to the parties, and having heard them and their evidence at various times and places make report of my findings as follows:

A.

The petition of June 10, 1908, is a petition filed by Nathaniel W. Hobbs, trustee in bankruptcy, in which he asserts that, as such trustee, he came into possession of all the real estate of the New England Breeders' Club, in Salem, New Hampshire, known as Rockingham Park; that the Head & Dowst Company of Manchester, claims to have a mechanics' lien upon all of said real estate on account of materials furnished and labor performed in erecting buildings thereon; that the Head & Dowst Company is not lawfully entitled to a lien on said property inasmuch as it has not complied with the terms of the mechanics' lien law of New Hampshire, and because its claim to said lien is based upon certain unauthorized and fraudulent waivers and admissions made by the Breeders' Club, its agents and officers and certain preferences and advantages which were given to said Head & Dowst Company in fraud of the bankruptcy law, and that if such lien should be established, it would be a fraud upon the trustee in bankruptcy and the general creditors of the Breeders' Club, and contrary to the provisions of the bankruptcy law. The petition also asserts that the alleged claim of the Head & Dowst Company constitutes a cloud upon the title of said real estate,

and in order to properly administer the estate of said bankrupt, and to sell said real estate to the best advantage, it is necessary to ascertain whether the Head & Dowst Company have acquired said lien, or any lien, and if so acquired, the amount and extent thereof.

16 B.

The petition of June 11, 1908, was filed by the Head & Dowst Company, and asserts that on December 24, 1906, it brought an action in the New Hampshire Superior Court against the Breeders' Club to secure and enforce its lien claim for labor and materials, and on that date it attached the real estate of said club; that on the fifth day of February, 1907, a petition in insolvency in the Rockingham County Probate Court was filed by creditors against the Breeders' Club; that said Probate Court assumed jurisdiction and decreed said club an insolvent debtor on the first day of March, 1907, and on the fifteenth day of April, 1907, appointed Nathaniel W. Hobbs assignee; that the writ of said Head & Dowst Company was served upon said Hobbs, assignee, and upon Henry F. Hollis, alleged to be the then clerk of said club, on the nineteenth day of April, 1907, thus notifying the Breeders' Club and assignee in insolvency of the pendency of said action and requiring them to appear and defend the same at the May Term, 1907, which it is alleged they did and that they continued to appear and defend said club before and at the trial of said action in December, 1907; that on the eighteenth day of December, 1907, the trial judge of the Superior Court awarded the Head & Dowst Company $46,748.08 and ordering judgment in rem against all real estate of said Breeders' Club attached in said action; that afterwards, upon request of the Breeders' Club and the assignee thereof, in consequence of exceptions taken at the trial, the case was transferred on exceptions to the Supreme Court of New Hampshire; that on the eighth day of May, 1908, the exceptions to the findings of the Superior Court were overruled by the Supreme Court; that on the thirty-first day of December, 1907, the Breeders' Club was adjudged bankrupt, and that on the first day of February, 1908, Nathaniel W. Hobbs was appointed trustee in bankruptcy of said Breeders' Club; that on the fourteenth day of April, 1908, said Hobbs, trustee, filed a petition seeking to restrain the Head & Dowst Company from taking further action in the State court. The Head & Dowst Company claim it was not duly notified of said petition for restraining order, and that it has never appeared by itself or by counsel in this court or in said State insolvency court; that on the fifteenth
17 day of May, 1908, this court temporarily restrained, until further order, the Head & Dowst Company from taking further action in the State court in its suit against the Breeders' Club to enforce a lien.

A.

An involuntary petition in bankruptcy against the New England Breeders' Club was filed in this court on the nineteenth day of

April, 1907. On the third day of December, 1907, an order of notice was issued requiring the New England Breeders' Club to plead to the petition in bankruptcy on the twenty-third day of December, 1907, and in the absence of service on the Breeders' Club, publication was duly made in the Portsmouth Herald. No pleadings having been filed, the adjudication of bankruptcy was entered on the thirty-first day of December, 1907. Schedules were filed on the thirteenth day of January, 1908, and, at a meeting of the creditors, Nathaniel W. Hobbs was appointed trustee in bankruptcy on the first day of February, 1908, and duly qualified as such by filing his bond and oath of the eighth day of February, 1908.

On the twentieth day of December, 1905, Andrew Miller, of New York City, conveyed to the New England Breeders' Club the following described real estate:

A certain tract of land, with the buildings thereon, situate in said Salem, southerly of Salem Depot, so called, and lying on both sides of Pleasant Street, being bounded and described as follows:

Beginning on the southerly side of Main Street at the northeasterly corner of land of A. M. Wade; thence easterly by said Main Street to Central Street; thence southerly by said Central Street to a bound at its southerly end; thence easterly by the end of said Central Street, by land of James H. Harley and by land of Frank P. Woodbury to the Manchester & Lawrence Railroad; thence southerly by said railroad to a point on said railroad opposite the southwesterly corner of land of George E. Kline; thence easterly crossing said railroad and by said Kline land to the Londonderry Turnpike, so called; thence southerly by said turnpike to land of John Brista; thence westerly by said Brista land crossing said railroad; thence southerly by said railroad to a highway at Cluff's
18 Crossing, so called; thence westerly by said highway to land of John Brista; thence northwesterly by said Brista land to the center of Policy Brook; thence southerly and westerly by the center of said brook to the line of land of David Hird; thence westerly, southwesterly and southerly by the center of said brook to its junction with Hedgehog Brook; thence westerly, northwesterly and westerly by said Hedgehog Brook to the highway leading from School House No. 8 to the homestead of Ezra B. Hall; thence northerly by said highway to said Pleasant Street; thence northeasterly by said Pleasant Street to a point opposite the southeasterly corner of land of said Ezra B. Hall; thence crossing said Pleasant Street and running northerly, then westerly by said Hall land to land of J. Fred Blethen; thence northerly, thence westerly by said Blethen land to the highway leading from the homestead of said Ezra B. Hall to the homestead now or formerly of J. Taylor; thence northerly by said highway to land of Lester L. Hall; thence easterly by said Hall land and land of Mary N. Kelly to said Pleasant Street; thence crossing said Pleasant Street and running northerly by said Pleasant Street to land of said A. M. Wade; thence easterly, thence

northerly by said Wade land to the point of beginning. Being all the real estate of said bankrupt.

So far as appeared, none of the above-described real estate has been conveyed by the Breeders' Club down to the time of the appointment of the trustee in bankruptcy.

The by-laws of the Breeders' Club provided its officers should consist of a president, two vice-presidents, treasurer, clerk, five directors, and a board of governors, and that all officers should hold office for one year or until other officers should be elected and qualified. In enumerating the duties of the president, the by-laws provided that the president should preside at all meetings of stockholders, sign all certificates of stock, and perform such other duties as might be required of him by law, by vote of the directors, or by the by-laws of the club. It was provided that the directors should have and take general supervision and management of the financial and prudential business of the club, with full power in regard to the same; that they should keep, or cause to be kept, true and
19 accurate record of their meetings, and should prescribe such rules in regard to calling their meetings as might be deemed necessary.

On the twentieth day of July, 1905, the first meeting of the stockholders of the club was held, and Andrew Miller was elected president, and he was also elected one of the three directors who were elected at that time, and who served until July 2, 1906, when five directors were elected.

At an adjourned annual meeting held July 2, 1906, Andrew Miller was again elected as a director.

Mr. Miller never resigned, either as president or director of the club, and no successor to either of his official positions was ever elected.

On the thirty-first day of August, 1905, a contract was entered into between the Breeders' Club and the Head & Dowst Company, whereby the latter agreed to erect for the Breeders' Club for the sum of $187,644 various buildings and structures, with sidewalks, platforms and fences on its premises at Salem, New Hampshire.

The sidewalks mentioned consisted of brick laid down in the earth, without cement, for walks between the various buildings, varying in width and length. The platforms were laid down at the ends of the side tracks for the accommodation of passengers entering and leaving trains, and of course were for the purpose of making entrance to the grounds of the Breeders' Club more accessible to the public who were expected to be patrons of the club at its race meets. The fences were between the field stand and the highway and side tracks, and apparently were for the purpose of excluding the public from the grounds. It must be borne in mind, however, and it is a fact, that these fences were built by the Breeders' Club after it made its contract with the Head & Dowst Company. These fences were not on the ground when the Breeders' Club acquired title to the land from Andrew Miller, or when the Breeders' Club executed its building contract with the Head & Dowst Com-

pany. There was also included in the contract a jockey board consisting of two large upright posts for displaying the numbers of the jockeys. These sidewalks, platforms, fences and jockey board were all affixed to the realty so that they became a part of the real estate.

20 This building contract was executed on behalf of the Breeders' Club by Andrew Miller, its president.

At a meeting of the board of directors of the Breeders' Club, held on the twenty-fourth day of October, 1905, the said building contract with the Head & Dowst Company was approved and ordered placed on file. As the resolution of approval appears on the directors' records, the total amount of the contract was stated as $188,307, which is the amount of the original contract price, plus the amount of the first two additions to the contract.

Among other things, this contract provided that the work should be done according to certain plans and specifications to be prepared by the architects of the owners, Messrs. Peters & Rice; that the work should be carried on to the satisfaction of the architects; that the contractor should prosecute the work speedily and continuously and that the entire work covered by the contract should be completed by the fifteenth day of May, 1906. The clause in the printed contract with reference to damages for failure to complete it within the time specified was canceled in red ink. In this connection, it was provided that the agreement to prosecute and finish the work should "be considered as of the essence of this contract." It was further provided in the contract as follows:

The Owner's Agreement.

The owner agrees to pay the contractor the sum of One Hundred Eighty-seven Thousand, Six Hundred Forty-four Dollars in manner following and subject to the conditions hereinafter set forth:

Eighty per cent. of the architect's estimate of the work done and incorporated in the building in monthly installments, according to the written certificate of the architect, and the balance, Thirty-seven Thousand, Five Hundred Twenty-eight 80/100 Dollars ($37,528.80) thirty-five days after the completion of this contract.

Provided, however, that none of the foregoing payments shall be due or payable unless the following conditions shall have been complied with:

1. Unless the Contractor shall request the Architect in writing to make such payment, and shall present to the Architect a detailed statement signed by him, the Contractor, of the amount of work done and incorporated in the building to the date of the statement.

21 2. Unless the work to the date in question has been done in the manner herein agreed, and there has been no breach by the Contractor of any of the provisions of this contract.

3. Unless the Contractor shall deliver to the Owner the written

certificate of the Architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed.

4. Unless (if the contract include excavations or mason work on outside walls) the Contractor shall deliver to the Owner the written certificate of some competent surveyor to be selected by the Owner that there has been no encroachment upon the adjoining public or private property.

5. Unless the property is free from all liens or right of lien for debts due or claimed to be due from the Contractor, and satisfactory evidence thereof furnished (if requested) to the Owner.

The trustee requests a finding that none of these conditions, except 4 and 5, were ever complete except as herein stated. I make this finding with the following qualifications:

(1) So far as the evidence disclosed, the contractor made but one request in writing for the issuance of a certificate by the architect, and that was under date of September 29, 1906. Nor were detailed statements in writing of the amount of work done and incorporated in the buildings submitted, except that a statement of the entire account of the Head & Dowst Company was submitted some time in September, 1906, and the bill of extras under date of October 12, 1906. Oral statements of the amount of work done were furnished by the Head & Dowst Company to the architects and certificates for payment were thereupon furnished by the architects to the Breeders' Club and payments were made on same by the club. And so far as it is a question of fact I find that the Breeders' Club waived the provisions of the contract in this respect.

(2) The work had been done by the contractor in accordance with the terms of the contract with the exception that the work, so far as it had been completed at all, had not been completed at the time specified, but, as will appear herein, I find that the contractor was prevented by the owner from completing the contract within the time specified.

(3) In the early work under the contract the architects sent their certificates to the Head & Dowst Company, who forwarded same to the Breeders' Club for payment. In the later stages of the
22 work the architects themselves forwarded the certificates direct to the Breeders' Club without going through the hands of the Head & Dowst Company. In one instance the Breeders' Club paid the Head & Dowst Company the sum of $5,000 without having received a certificate from the architects for that amount.

An example of one of the architects' certificates is as follows:

Am't of Contract..	$187,644.00
Am't Added	$7,885.00
Am't deducted ...	$4,051.00
Total	$191,478.00
Am't Performed ..	$
Previously Paid ..	$136,000.00
Am't Cont. Unpaid	$40,478.00

The receipt of the amount of $15,000 in accordance with the above certificate, is hereby acknowledged, and the work and material furnished by the undersigned is hereby guaranteed to be the best of its kind and strictly in accordance with the contract.

JULY 11, 1906.

Received Payment, as above.
THE HEAD & DOWST CO.
JOHN DOWST, *Tr.*

$15,000.00.

BOSTON, *June* 27, 1906.

This is to certify,

That Head & Dowst Company are entitled to a tenth payment of Fifteen Thousand Dollars, in conformity with their contract of August 31, 1905, with New England Breeders' Club for the buildings, etc., at Salem, N. H., to Head & Dowst Co., Manchester, N. H. Ckd. R. B. K.

PETERS AND RICE,
Architects.

No. 1015.

This certificate, whether issued as final or otherwise, is an opinion only, and is in no sense a guarantee on the part of the Architect, it is not to be interpreted as an acceptance of any work or material which is defective, or which is not in accordance with the contract, and in making payment under it the Owner reserves the right to hold the contractor strictly responsible for defective work or material, or for any violation of the contract.

[In margin:] Peters & Rice, Architects.

As to the architect, the following clause in the contract is provided:

23 The Architect.

The Architect shall have authority to enter and inspect the work at all times, to reject all material (whether incorporated in the building or not) and to condemn all work which, in his opinion, is not in conformity with the provisions, of this contract, and to do all the things hereinbefore set forth as within his powers. Neither the architect nor any person employed by him shall have any control or direction over the progress of the work, except the power of rejecting it, nor any control or superintendence over the scaffolding, apparatus, ways, works, machinery, or plant; and neither of

them shall have power to order extras or alterations, except as above provided, or any authority other than that expressly set forth in this contract. The Architect shall not be deemed the agent of the Owner for any purpose whatsoever, except as the Owner may in fact give him a special and express authority.

There was a paragraph in the contract headed "Alterations, Extras and Deductions," in which it was expressly provided that the architect might, from time to time, by an instrument in writing, and approved by the owner in writing, order the contractor to make changes in the work, and that in case the changes thus ordered should make the work less expensive to the contractor a proportional deduction should be made from the contract price; and in case the changes made the work more expensive a proportional addition was to be made to the contract price.

It was further provided in the contract that if the Breeders' Club did not make the payments provided as and when the same became due and payable, it should be liable to the Head & Dowst Company for interest on the same. And if such default continued for a period of ten days, the Head & Dowst Company might, by a written notice delivered to the Breeders' Club, terminate the contract.

The master deems it expedient to insert a complete copy of the contract between the Head & Dowst Company and the Breeders' Club, which is as follows:—

Building Contract, Between New England Breeders' Club of Salem, New Hampshire, Hereinafter Called the Owner, and The Head & Dowst Co., of Manchester, New Hampshire, Hereinafter Called the Contractor, Made at Boston, Massachusetts, the 31th *Day of August*, 1905.

24 The respective parties hereto, each in consideration of the agreements of the other herein set forth, agree with each other as follows:—

The Contractor's Agreement.

The Contractor agrees to do all work and furnish all material for the following buildings:—

Grand Stand, Club House, Jockeys' House, Paddock, 20 Stables and Kitchens, Paddock Stable, Pavilion, Field Stand, Judges' Stand, Timer's Stand, at Salem Depot, New Hampshire, for the New England Breeders' Club, according to certain plans and specifications prepared by the Architect. Wherever the word "Architect" or a pronoun in place of it is used in this contract, it shall be construed to mean the firm of Peters & Rice, or such other architect or architects as the owner may from time to time select, giving written notice of any change to the Contractor. Said plans and specifications, together with this contract, of which they are to be deemed a part, are to be construed together, so that any work shown on the plans, though not mentioned in the specifications, or vice versa, or any provision of the contract not repeated in the plans or specifica-

tions, or vice versa, is to be executed by the Contractor as a part of this contract. Figured dimensions are to prevail over scale. All things which in the opinion of the architect may fairly be inferred from the plans and specifications are to be executed by the contractor as a part of this contract. If complete drawings of detail have not yet been made, the same, when made and conforming to said plans and specifications, are to constitute a part of this contract, the architect being the sole judge as to whether said detailed drawings conform to said plans and specifications. All the plans and drawings received by the contractor at any time during the continuance of this contract are at its termination to be returned to the architect.

All material and work, where the quantity, dimensions, and quality are not shown on the plans or specified in the specifications, are to be furnished in sufficient quantity and of sufficient dimensions for the proper execution of the work as determined by the architect; and the quality and workmanship are to be the best throughout, and satisfactory to the architect.

The contractor is to take out at his own expense all necessary permits from the municipal or other public authorities, to give all the notices required by law or municipal ordinance, and to pay all fees and charges incident to the due and lawful prosecution of the work covered by this contract.

If this contract involves excavation or mason work, the contractor shall execute the same without encroachment upon adjoining public or private property, and shall procure for the owner the certificate of some competent surveyor, to be selected by the owner, that there has been no such encroachment.

The contractor shall devote his time and personal superintendence to the execution of this contract, and shall employ a competent foreman or clerk of the works, who shall at all times be present while any work is being done under this contract, at the building.

The entire work and all its parts, including material, workmanship, and rate of progress, shall be satisfactory to the architect. All materials rejected by the architect, whether worked or unworked, and whether incorporated in the building or not, shall be removed from the premises (and for that purpose taken down if already attached to the building) at the request of the architect; and all work condemned by the architect, as in any way unsound or as not conforming to the terms of this contract, shall be taken down forthwith and rebuilt by the contractor in accordance with the contract and in a manner satisfactory to the architect. The contractor shall dismiss any of his employés if the architect considers said employé incompetent or careless and so informs the contractor.

The contractor shall clear away all dirt and rubbish caused by his operations as often as requested by the architect or owner, and shall leave the premises at the termination of this contract free from such dirt and rubbish and in a neat and clean condition.

The contractor shall prosecute the work speedily and continuously and the entire work covered by this contract shall be finished by the 15th day of May, 1906.

The agreement thus to prosecute and finish the work shall be considered as of the essence of this contract.

The contractor shall make good all defects, omissions, and violations of the terms of this contract whensoever discovered, during the progress of the work or afterwards, notwithstanding any payments that may have been made, or any certificates that may have been given, or any possession or acceptance of the work by the owner, and shall be responsible for any damage that may be caused in making good said defects, omissions, or violations.

The contractor shall comply with all the laws, ordinances, and regulations for the time being in force in the city or town where the building is situated and relating to the building or other work included in this contract, and shall satisfy all the requirements of the inspectors (if there be such).

26 The contractor shall furnish all transportation, scaffolding, apparatus, ways, works, machinery, and plant requisite for the execution of this contract, and shall be solely answerable for the quality of the same and for the safe, proper, and lawful construction, maintenance, and use thereof; he shall cover and protect his work from damage, and all injury to the same, before the completion of this contract, shall be made good by him; and shall be solely answerable for all damage to the owner or his property, to other contractors or employés of the owner, to neighboring premises, or to any person or property, due to the improper, illegal, or negligent conduct of the contractor, or of his sub-contractors, employés, or agents, in or about the said building, or the execution of the work covered by this contract or any extra work undertaken as hereinafter provided, or to any defect in or improper use of the scaffolding, apparatus, ways, works, machinery, or plant.

The contractor shall have sole charge and possession of the work covered by this contract until the termination thereof, but shall permit the owner and the architect and any person employed by either of them to visit, enter, and inspect the said work at all times and places during the progress thereof, and shall provide safe and proper facilities for such inspection.

The contractor shall permit other contractors or employés of the owner to prosecute their work, and shall render them all necessary assistance.

The Owner's Agreement.

The owner agrees to pay the contractor the sum of One Hundred Eighty-seven Thousand, Six Hundred Forty-four Dollars in manner following and subject to the conditions hereinafter set forth:

Eighty per cent. of the architect's estimate of the work done and incorporated in the building in monthly installments, according to the written certificate of the architect, and the balance, thirty-seven thousand, five hundred twenty-eight 80/100 dollars ($37,528.80) thirty-five days after the completion of this contract.

Provided, however, that none of the foregoing payments shall be due or payable unless the following conditions shall have been complied with:—

1. Unless the contractor shall request the architect in writing to make such payment, and shall present to the architect a detailed statement signed by him, the contractor, of the amount of work done and incorporated in the building to the date of the statement.

2. Unless the work to the date in question has been done in the manner herein agreed, and there has been no breach by the contractor of any of the provisions of this contract.

27 3. Unless the contractor shall deliver to the owner the written certificate of the architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed.

4. Unless (if the contract include excavations or mason-work on outside walls) the contractor shall deliver to the owner the written certificate of some competent surveyor to be selected by the owner that there has been no encroachment upon adjoining public or private property.

5. Unless the property is free from all liens or right of lien for debts due or claims to be due from the contractor, and satisfactory evidence thereof furnished (if requested) to the owner.

Alterations, Extras and Deductions.

The architect may from time to time, by an instrument in writing signed by him and approved by the owner in writing, order the contractor to make any changes in the work; but shall otherwise have no power to make any change in this contract. In case the changes thus ordered make the work less expensive to the Contractor, a proportional deduction shall be made from the contract price above specified; and, in case said changes make the work more expensive, a proportional addition shall be made to said contract price.

In case of any change ordered as aforesaid, or in case any other changes in the work are made by the mutual consent of the parties hereto, whether affecting the contract price or not, or the time of completion or not, all and singular the other provisions of this contract shall remain in force and apply to the contract as thus altered.

No change in this contract ordered or made as herein provided, and no over certification or payment, if any, shall make void any bond that may be given by the Contractor.

The Architect.

The Architect shall have authority to enter and inspect the work at all times, to reject all material (whether incorporated in the building or not), and to condemn all work which, in his opinion, is not in conformity with the provisions of this contract, and to do all the things hereinbefore set forth as within his powers. Neither the Architect nor any person employed by him shall have any control or direction over the progress of the work, except

the power of rejecting it, nor any control or superintendence over the scaffolding, apparatus, ways, works, machinery, or plant; and neither of them shall have power to order extras or alterations, except as above provided, or any authority other than that expressly set forth in this contract. The Architect shall not be deemed
28 the agent of the Owner for any purpose whatsoever, except as the Owner may in fact give him a special and express authority.

Miscellaneous Provisions.

No payment of money under this contract nor any acceptance or possession taken of the work done by the Contractor nor any certificate given shall be evidence of the performance of this contract or be construed as a waiver of any of its provisions by the Owner; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach.

If, in the opinion of the Architect, the Contractor is obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of any other contractor or by any damage which may happen thereto by fire or by the unusual action of the elements or by the abandonment of the work by the employés in a general strike, then the Contractor shall be entitled to such extension of the time specified above for the completion of the work as the Architect shall in writing certify; provided, however, that claim is made by the Contractor at the time and in writing.

If at any time before the completion of this contract the Contractor becomes bankrupt or insolvent, or makes an assignment for the benefit of creditors, or assigns this contract or sublets any part of it without the consent of the Owner first obtained in writing, or becomes incapable of completing the contract, or shall at any time for six days refuse or neglect to proceed with the contract work in the manner herein agreed to the satisfaction of the Architect, then the Owner may at once terminate this contract by a written notice delivered to the Contractor in person or at his usual place of business, and proceed to complete the work with other mechanics or contractors, and account to the Contractor or his legal representatives as follows: The Owner shall be credited with all payments theretofore made by him to the Contractor, with the entire cost of completing the work with said other mechanics and contractors, and with all damages by delay or otherwise caused by the default of the Contractor, including reasonable expenses of counsel. If the contract price exceeds the total amount of these credits, the excess shall be paid to the Contractor or his legal representatives. If, however, the total amount of the said credits exceeds the contract price, the excess shall be due from the Contractor to the Owner. In such accounting, the Owner shall not be held to obtain the lowest figures for the work of completing the contract, but all sums actually paid by him for such completion shall be credited to him.

All scaffolding, apparatus, ways, works, machinery, and plant

brought upon the premises by the Contractor, or used by him,
29 shall remain his property; but, in case of default and a completion of the contract work by the Owner, as above provided, the latter shall be entitled to use the said scaffolding, apparatus, ways, works, machinery, and plant without cost or liability for depreciation or injury by use.

If the Owner does not make the payments herein provided as and when the same shall become due and payable, he shall be liable to the Contractor for interest on the same; and, if such default continues for a period of ten days, the Contractor may, by a written notice delivered to the Owner in person or at his usual place of business, terminate this contract. But the acceptance of any money under this contract subsequent to such default shall operate as a waiver thereof and of the right to terminate this contract by reason thereof.

The Owner shall keep the building and the material on the premises insured against fire in such companies as he shall select, for the benefit of himself or any mortgagee and of any and all contractors on the building who shall request such insurance in writing. The expense of said insurance shall be paid in the first instance by the Owner, and one half of the sums thus paid shall be reimbursed to the Owner by the Contractor, and may be deducted from any payment otherwise due; but the Owner shall not be responsible for carrying too little insurance, unless the Contractor has requested him in writing to insure in a certain specified amount, and the Owner has neglected to do so for an unreasonable length of time. In the event of a fire insurance money shall be divided between the Owner and any mortgagee and those contractors for whose benefit the insurance was taken out, as their interests may appear; and the parties hereto shall respectively proceed to the completion of this contract.

In witness whereof, we, the said New England Breeders' Club and the said Head & Dowst Company hereto set our hands and seals this thirty-first day of August, 1905.

NEW ENG. BREEDERS' CLUB, [SEAL.]
ANDREW MILLER, *Pres.*
THE HEAD & DOWST CO., [SEAL.]
By F. DOWST, *Pres.*

Subsequent to the execution of the original contract, the architects in writing ordered the Head & Dowst Company to make certain additions to and deductions from the original contract in the manner as therein expressly provided. These orders were executed by Andrew Miller, purporting to act as president of the Breeders'
Club, and by the Head & Dowst Company. The additions
30 to the contract were on orders numbered 1, 2, 4, 8, 10, 11, 12.
The first addition to the original contract was by order No. 1, dated October 2, 1905, and the last was order No. 12, dated December 7, 1906.

An example of the orders is as follows:—

NOTE.—The Owner is to sign this order and duplicate and return same to Architect's office.

The Contractor is to sign duplicate and return same to Architect's office.

$273.00 BOSTON, *October* 2, 1905.

Order No. 1.

M Head & Dowst Co.

You are hereby ordered to add to the Contract of August 31, 1905, with M. N. E. Breeders' Club for the buildings on race track at Salem, N. H., the sum of Two Hundred Seventy-three Dollars for raising foundation wall of Jockey House 2′ 6″ ($220.00); and for relocating paddock stables and digging new post holes ($53.00).

NEW ENGLAND BREEDERS' CLUB,
ANDREW MILLER, *Pres., Owner.*

No. 832.

Accepted. THE HEAD & DOWST CO., *Contractor.*
JOHONNET.

On margin: Peters & Rice, Architects.

Amount of original Contract.	Amount added.	Amount Deducted	Total Amount
$187,644.00	$273.00	$.....	$187.917.00

There were also various deductions made from the original contract as per order numbers 3, 5, 6, 7, 9, all being signed by Andrew Miller, purporting to act as president of the Breeders' Club.

The evidence in regard to the orders authorizing the Head & Dowst Company to make additions to and deductions from the original contract was admitted subject to the trustee's exception, the objection being that it did not appear that Andrew Miller had authority to bind the club in this respect.

The original contract with the Head & Dowst Company, as signed by Andrew Miller, president, acting for the owner, clearly contemplated that additions to and deductions from it were to be made from time to time, as occasion might require, provided
31 the architect so ordered in writing, and the owner approved thereof. Of this there can be no question.

While it is true that there was no resolution or vote of the board of directors, authorizing additions to or deductions from the original contract, yet Mr. Miller, president of the club, had, in its behalf, executed the original contract and two orders for additions thereto, and his authority to execute the same was never disapproved by the board of directors, but, on the contrary, was subsequently expressly ratified and confirmed, and I think it may

fairly be inferred that if the president of the club, with the approval of the board of directors, had authority to execute the original contract for and in behalf of the club, that, as deductions and additions were expressly provided for in that contract, the contract and its subsequent additions and deductions should be treated as an entire contract and that the authoriy in Mr. Miller to execute such orders would seem to be beyond dispute.

The directors met only at infrequent intervals and apparently the management of the ordinary business of the corporation was left in the hands of the president, who really had actual charge of the club's business. He was paid a salary of $5000, and was the only one of the directors who was paid a salary. Mr. Miller was on the grounds at Salem occasionally, and was the man to whom the ordinary routine business affairs were referred, and he was the man with whom the Head & Dowst Company did its business and carried on its correspondence.

Mr. Miller testified that it was generally known to the other directors of the Breeders' Club what he was doing in its behalf, and that to his personal knowledge he could not recall that any objection to his course of dealing had ever been made, and no evidence was introduced to show that any of the directors or stockholders had ever entered any objections to the conduct of Mr. Miller as president.

From this course of dealing, and from the further fact that the orders for additions and deductions were executed to carry out the design of the original contract, it would seem fair to draw a logical conclusion, so far as it is for the master to determine, that the execution of the orders for additions and deductions, at least so far as the Head & Dowst Company are concerned, were within the apparent scope of the president's powers.

32 As disapproval of Mr. Miller's actions in executing orders for additions to and deductions from the contract had at no time been brought to the attention of the Head & Dowst Company, and payments on account had been made from time to time, the officers of the Head & Dowst Company must inevitably have been led to believe that Mr. Miller possessed the power he purported to have in executing these orders, and the trustee of the Breeders' Club ought not at this time to be permitted to urge lack of power in defence of the Head & Dowst Company claim.

The Head & Dowst Company were delayed in the completion of its building contract for a period of at least three months by the failure of the Breeders' Club to furnish the structural steel for certain of the buildings, so that the contract had not been fully completed when the club held its first race meet, commencing on the twenty-fifth day of June, and continuing until July 21, 1906. Operations were continued in a small way by the Head & Dowst Company during the race meeting, in way of painting, brick paving and some other matters.

The contract provided that the building should be supplied with wooden shutters, but the architect failed to provide the working plans and specifications for the shutters until some time in September.

Brick for paving was shipped to the grounds as late as November 12, 1906, some of the brick being hauled by men hired for that purpose by Head & Dowst Company as late as December 7, 1906. The working plans for the shutters having been received in September, the lumber was shipped to Salem about November 22, 1906.

The work which was done subsequent to the race meet consisted of painting, laying of paving brick, putting up certain shutters, and some other things.

On October 19, 1906, notes to the amount of $28,000 were executed by Andrew Miller, as president, and W. H. Bissett, treasurer of the Breeders' Club, in favor of the Head & Dowst Company, the notes being payable in three months, and bearing interest at the rate of five per cent., and dated back to September 18, 1906. These notes were authorized at a meeting of the board of directors held September 17, 1906. These notes were accepted by the
33 Head & Dowst Company under the following stipulation in writing that their rights to a builder's lien were in no wise waived:—

MANCHESTER, N. H., *Oct.* 15, 1906.

Received of the New England Breeders' Club on account of contract for buildings at Rockingham Park, Salem, N. H., the following notes:—

18 notes for $1,000 each, dated September 18, 1906, for three (3) months, payable at the Knickerbocker Trust Company, New York, and 5 notes for $2,000 each, dated September 18, 1906, for three (3) months, payable at the Knickerbocker Trust Company, New York.

In taking notes of the New England Breeders' Club for a part of the indebtedness due from said Club to the Head & Dowst Company for labor and materials performed and furnished by said company on buildings of said Club at Rockingham Park in Salem, New Hampshire, under a contract for such purpose between the parties, which contract is not yet wholly performed, the Head & Dowst Company does not take said notes in discharge of the amount due it from said Club, nor in discharge of any lien which said company may have upon the property of said club on account of the labor and materials performed and furnished under said contract.

THE HEAD & DOWST CO.,
By JOHN DOWST, *Treas.*

On September 24, 1906, the Head & Dowst Company wrote to Mr. Miller, president of the Breeders' Club, that they were in critical financial condition, and urging the club to furnish them with money for a part of their bill as soon as possible. In that letter they state, "According to a strict construction of the terms of the contract the remaining 20% may not be due, but we think, after consideration, you will waive that point and help us out in order to save us trouble." Mr. Miller replied to this letter under date of September 26, 1906, that he had talked with the principal stockholders about paying the Head & Dowst Company in cash, but that his efforts had been unavailing and he said further, "I am afraid

that we can do nothing except send you notes in any convenient amounts you may suggest for the amount that Mr. Rice will include in your certificate."

On September 29, 1906, the Head & Dowst Company wrote to the architects, as follows:—

34 We have this day received a letter from Mr. Miller, president of the N. E. Breeders' Assn., in which he says that he cannot send us any cash as we request, but offers to send us notes in any convenient amount for the amount that Mr. Rice will include in a certificate.

This is a very bad matter for us and we don't see how we can use the notes; however, we think that you should give us a certificate for $25,000 or $30,000, so that he can be in a position to pay us.

We know that the shutters and the paving are not quite done, but we do not see how we can go and put $3,000 or $4,000 more in there until we get something out of it.

Will you please send this certificate at once to Mr. Miller and oblige?

The above letter was introduced by the trustee.

On September 29, 1906, the architects sent to the Head & Dowst Company a letter which unquestionably was in reply to their letter of the same date. This letter of Peters & Rice is as follows:—

We have today forwarded to the New England Breeders' Club a certificate for payment to you of $25,000.

Please send your bill of extras and let us know what progress is being made on the shutters.

The letter of Peters & Rice, dated September 29, 1906, was admitted subject to the trustee's exception, the objection and exception being that "any communication or letter from the architect, who under the terms of the contract could not be the agent for the Breeders' Club for any purpose, is hearsay and therefore incompetent; and further because it is not an admission made by an authorized agent of the Breeders' Club." No special or express authority was given the architect to act as the agent of the Breeders' Club in writing the letter of September 29, 1906, stating that he had sent a certificate for $25,000 to the Breeders' Club, unless such authority is derived from the original contract making Peters & Rice the agents of the club to prepare certificates for payment.

Inasmuch as Mr. Miller, in his letter of September twenty-six, said to the Head & Dowst Company that the club would execute notes to the company in any convenient amount that Mr. Rice would include in his certificate, and as the Head & Dowst Company, by letter of September twenty-nine, requested Peters & Rice to send to the Breeders' Club a certificate for $25,000 or $30,000, and as Peters & Rice, in their letter of September twenty-nine, say they have sent a certificate to the New England Breeders' Club

35 for $25,000, and as the Breeders' Club, on October 15, executed notes for $28,000, it must inevitably follow and I find that a certificate for at least $25,000 was actually sent to and received by the New England Breeders' Club.

On the twenty-sixth day of September, 1906, the following letter,

referred to above, was written by Andrew Miller and sent by him to the Head & Dowst Company, and was received by it in due course of mail:—

September 26, 1906.

Messrs. Head & Dowst Co., Manchester, N. H.

GENTLEMEN: I have talked with our principal stockholders about paying you in cash as per your request of the twenty-third and twenty-fifth inst., but my efforts have been unavailing. I am afraid that we can do nothing except send you notes in any convenient amounts you may suggest for the amount that Mr. Rice will include in your certificate. I am awfully sorry but I do not see any way of arranging payment.

Yours very truly, ANDREW MILLER, *President.*

On December 14, 1906, the following letter was written by Andrew Miller and sent by him to the Head & Dowst Company, and received by it in due course of mail:—

December 14, 1906.

Messrs. Head & Dowst, Manchester, N. H.

GENTLEMEN: I beg to advise you that the New England Breeders' Club will not be able to meet the note given you for $28,000, due December 18, 1906, and most respectfully requests that you allow us to renew the same under the same term for a period of four months from December 18th, 1906.

We will be pleased to send you a note at four months in settlement of the balance due you.

Kindly communicate with the New England Breeders' Club at once.

Yours truly, ANDREW MILLER, *President.*

On December 19, 1906, the following telegram was sent by Andrew Miller to the Head & Dowst Company, and duly received by it:—

36 NEW YORK, *Dec.* 19.

To Head & Dowst Co., Manchester, N. H.

Owing to inability to secure the consent of a majority of the creditors of the New England Breeders' Club we will not renew the note given you as per letter written you, the New England Breeders' Club has no funds to meet the note given you.

ANDREW MILLER.

On December 20, 1906, the Head & Dowst Company sent its attorney, Mr. Jones, to interview Mr. Miller regarding their claim. Subject to the exception of the trustee that Mr. Miller had no authority to bind the Breeders' Club by any admissions he might have made, Mr. Jones testified in substance that Mr. Miller said that the Breeders' Club had no funds, that the stockholders had refused to put any more money in, and that the directors would not personally endorse the notes, that they would pay nothing, and that the Head & Dowst Company must look to their lien to support their claim,

and that that is what he meant by his telegram of December nineteen.

There can be no question that in the fall of 1906 the New England Breeders' Club was hopelessly insolvent. The information conveyed to the Head & Dowst Company by Mr. Miller's letters and telegram, and his talk with their attorney, was such as to inevitably lead the officials of that company to believe that the Breeders' Club was insolvent and that its obligations under the contract would not be honored. Thereupon the Head & Dowst Company abandoned work under the contract and commenced its lien suit. Its reason for abandoning the work was that the Breeders' Club had not paid the notes which they gave October 15, 1906, and because they were considered insolvent. At the time the contract was abandoned it had been completed with the exception of the shutters on the grand stand. It would have cost approximately $1,000 to complete these shutters. The Head & Dowst Company had full knowledge when it abandoned work under the contract that it had not been completed in full.

The Breeders' Club did not fail to make any payment as and when the same became due and payable, except as the notes hereinafter mentioned may be considered such payment.

The bill of extras amounting to $9,648.02 was not added to the contract until December 7, 1906, as appears from plaintiff's
37 Exhibit No. 2, although these extras were furnished prior to October 12, 1906. When the directors voted to give the Head & Dowst Company notes on September 17, 1906, the amount due under the contract, with additions to date, was $196,245. (Trustee's Exhibit No. 19.) The deductions and payments to that date were $160,767. (Trustee's Exhibit No. 20.) This left a balance under the contract, with additions and deductions, of $35,478. This balance was less than 20% of the entire amount of the contract, with additions and deductions to date, and no further written additions were added to the contract until order No. 12 for extras, amounting to $9,648.02, was added to the contract December 7, 1906.

The Head & Dowst Company did not obtain a certificate for extension of time from the architect, as provided in the contract under head of "Strikes and Other Delays," nor did the contractor make a claim for extension of time in writing as therein provided, nor did the Head & Dowst Company deliver to the Breeders' Club any written notice terminating the contract.

In this connection, however, the fact must be borne in mind that the Head & Dowst Company were prevented from completing their contract within the time specified by the acts of the New England Breeders' Club and its authorized agents, as herein mentioned, in failing to seasonably provide the structural steel, detailed plans for shutters, etc.

And so far as it is a question of fact, I find that the failure on the part of the Breeders' Club to make its payment under the contract constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract and from proceeding further with the construction work. I should state in this connection that the pay-

ments referred to are the notes for $28,000 given to the Head & Dowst Company after receipt of the architect's certificate, and there was no failure on the part of the Breeders' Club to make payments except as they failed to pay the notes of October fifteen for $28,000. No cash payment was made after August 13, 1906.

So far as the portion of the contract with reference to time being of the essence of the contract is concerned, I find that the Head & Dowst Company were delayed three or four months in its work by the failure of the Breeders' Club to seasonably furnish the structural steel for certain of the buildings, and by failing seasonably
38 to prepare the grounds so that certain brick paving could be done, and also by failing to seasonably furnish the detailed drawings for the shutters for the grand stand. Work was also delayed, of course, during the track meet. Although the contract did provide that an extension of time might be granted by the contractor making application in writing, yet I find from the evidence that the Breeders' Club, by its own conduct, prevented the Head & Dowst Company from completing the contract within the specified time. I find that the Head & Dowst Company were reasonably diligent, under the circumstances, in the prosecution of their work under the contract.

I find that there is due the Head & Dowst Company the balance of the contract price, less $1,000, being the estimated expense for completing the shutters, and about $25 for furnishing certain items of personal property, or work on the same, so that there is due the Head & Dowst Company, exclusive of interest, $45,995.02, for which it is entitled to judgment in rem against the property of the Breeders' Club.

As to the property covered by the lien:—

The land and all the buildings thereon had been deeded by Andrew Miller to the New England Breeders' Club as an entirety. Included in the deed of Andrew Miller to the club was the so-called "McKinnon" property, which it became necessary for the club to purchase in order to build its race course. This property consisted of a lot of land with a small barn and orchard. A part of this property went into and became a part of the race course. The race course was, however, separated from that part of the McKinnon property as did not go into the race course by a fence built while the work of the Head & Dowst Company was in progress on the grounds. This house was leased by the club to some one not connected with the tracks, and was not occupied by any one connected with the club. There was no actual racing of horses on the part of the McKinnon property which was set off by the fence built after its acquisition by the Breeders' Club.

No work was done by the Head & Dowst Company on the McKinnon house.

There was no actual racing of horses on the land northerly and westerly of New Pleasant Street and the land southerly and
39 westerly of the railroad side tracks, and the same has never been used for racing purposes. There areas were included in the land covered by the deed of Andrew Miller to the New England Breeders' Club, and were set off by the club from the parts of the

track actually used for racing purposes by fences built by the club after the acquisition of the property. The fences were built after the purchase of the property by the club and subsequent to the date of the building contract with the Head & Dowst Company.

I have been requested by the trustee to find that considerable damage was caused by the failure of the Head & Dowst Company to complete the shutters for the grand stand, thereby permitting the snow and rain to injure the buildings and certain chairs under the grand stand. I find in regard to this that undoubtedly because shutters were not erected, that the elements did do damage to the interior of the building and to some chairs, but not exceeding in amount $1,000.

B.

With reference to the status of the lien suit instituted in the Superior Court for the State of New Hampshire by the Head & Dowst Company, I make the following findings:—

On the twenty-fourth day of December, 1906, the Head & Dowst Company brought an action against the New England Breeders' Club, under the New Hampshire statute, to secure and enforce its claim for a lien for labor performed and materials furnished, the action being returnable in the Superior Court, for the county of Hillsborough, at the May Term, 1907, and on said twenty-fourth day of December, 1906, all the real estate of the Breeders' Club in Salem, New Hampshire, was attached for the purpose of securing and enforcing said lien claim. The property attached, as shown by the officer's return, was the same property as described in the deed of Andrew Miller to the Breeders' Club.

On February 5, 1907, an involuntary petition in insolvency was filed in the Probate Court, for the county of Rockingham, seeking to have the Breeders' Club adjudicated an insolvent debtor under the insolvency laws of New Hampshire, and thereafter, on the fifteenth day of April, 1907, N. W. Hobbs, of Concord, New Hampshire, was appointed assignee in insolvency.

40 The Head & Dowst Company served its writ upon the said Hobbs, and upon Henry F. Hollis, then clerk of the Breeders' Club, on the nineteenth day of April, 1907. The action was duly entered in the May Term, 1907, for Hillsborough County Superior Court, and Eastman, Scammon & Gardner entered their appearance in that court for N. W. Hobbs, the assignee.

As appears from the pleadings, the action was based upon the original contract, with the subsequent additions and deductions.

An involuntary petition in bankruptcy was filed in this District Court April 19, 1907, and an adjudication of bankruptcy was entered December 31, 1907. Although the petition in bankruptcy was filed April 19, 1907, no order of notice was issued until December 3, 1907. Nathaniel W. Hobbs, then acting as assignee in insolvency, was appointed trustee in bankruptcy, February 1, 1908, and qualified as such on February 8, 1908. On February 10, 1908, Mr. Hobbs, the assignee, turned over to himself, as trustee, all property of the Breeders' Club then in his possession, including all monies then on hand.

The lien suit of Head & Dowst Company against the Breeders' Club was tried by Honorable R. J. Peaslee, presiding justice, without a jury, on December 6, 1907. Mr. Scammon and Mr. Henry F. Hollis appeared before Judge Peaslee in behalf of the assignee in insolvency, and one or the other of these gentlemen was present throughout the entire trial, defended the action with care, and, so far as can be observed, a full, complete, and impartial trial was had. So far as I can observe, there is no substantial variance between the evidence offered before Judge Peaslee and that presented to the master in the present proceeding. It should be stated, however, that so far as I can discover, neither the letter of Head & Dowst Company to Peters & Rice, of September 29, 1906, requesting the issuance of an architect's certificate, nor the letter of Peters & Rice, of the same date, to the Head & Dowst Company, stating that an architect's certificate for $25,000 had been sent to the Breeders' Club, were in evidence before Judge Peaslee.

Before the trial was commenced before Judge Peaslee, counsel for the assignee in insolvency informed him, orally, that a petition in bankruptcy against the Breeders' Club was pending in the District Court, but the presiding justice proceeded with the trial, and
41 at the conclusion of the case ordered judgment in rem against all the real estate of the Breeders' Club in the sum of $46,748.08.

As a consequence of certain exceptions taken by the assignee in insolvency at the trial before Judge Peaslee, a case was drawn in accordance with the practice of the State Courts, and the action was transferred to the Supreme Court and was entered in that court on February 3, 1908. The docket entries of that court show that Henry F. Hollis and Eastman, Scammon & Gardner, appeared for the assignee in insolvency and that they filed a brief in his behalf on April 7, 1908.

As appears from the rescript of the Supreme Court of April 8, 1908, the court said with reference to the action then pending before it:—

The assignee in insolvency is understood to have withdrawn. As to him the exceptions are overruled. The trustee in bankruptcy is not a party. It does not appear that the claims of subsequent attaching creditors have been established. Under these circumstances, consideration of the exceptions would serve no useful purpose. We think the case should be postponed until the trustee in bankruptcy is made a party or the invalidity of the proceedings in bankruptcy established.

On April 17, 1908, the Head & Dowst Company filed a petition in the Supreme Court seeking an order of notice directed to the trustee in bankruptcy to show cause why he should not be made a party defendant to the Head & Dowst Company suit. This petition and the order of notice thereon was served upon the trustee in bankruptcy, April 18, 1908, and was made returnable on the first Tuesday of May, 1908.

On the eighth day of May, 1908, the Supreme Court handed down the following opinion:—

Per *Curiam:* This is a proceeding to perfect and enforce a lien claimed against certain property of the defendant. The case was heard by the Superior Court and certain orders made in favor of the plaintiff. To these orders exceptions were taken which were transferred to this court for determination. Prior to the hearing in the Superior Court, proceedings began under the State Involvency Statute and an assignee was appointed who took possession of the property of the defendant club and appeared by counsel and contested the action in the Superior Court. In due course a brief was filed in this court in the name of the defendants by counsel
42 who represented the assignee in the Superior Court, but the defendants made no appearance in that court. When the case came on for argument, counsel filing the brief stated that the defendants did not appear and that the assignee in insolvency had surrendered the property to a trustee appointed in proceedings in bankruptcy in the Federal court and had been discharged as assignee. It also appeared that counsel for other parties claiming liens on the property had entered appearances on the docket, but it did not appear that they had ever been admitted to defend the proceeding or had established any interest except that of general creditors represented either by the assignee in insolvency or the trustee in bankruptcy. In this situation the court declined to consider the exceptions until the bankruptcy proceeding should be dismissed or the trustee in bankruptcy be made a party and the case was postponed to the next session. Before the next session the plaintiffs obtained and served upon the trustee in bankruptcy an order notifying him of the pendency of the proceedings. Upon the return of this notice at the next session of the court, counsel for the trustee in bankruptcy appeared specially, being the same counsel who had previously appeared for the assignee, and it being brought to the attention of the court that such counsel had requested to be notified of an application for an order of notice so that he might be heard thereon, which request by accident was not brought to the attention of the court, and the court ruled that counsel could then be heard upon the question whether an order of notice should be issued. Counsel thereupon appearing specially in behalf of the trustee made a statement for the information of the court, but declined to make any motion or suggestions as to the proper procedure or to object to the issuance of an order of notice. It appeared from the statements of counsel that prior to the hearing in the Superior Court a petition in bankruptcy had been filed in the Federal court, but no further action had been taken thereon, and that the property remained in the possession of the assignee until after the hearing, and that the same person who was assignee and held the property under the proceeding in the State court has been appointed trustee in bankruptcy; that the situation of the property is such that the question of title raised by the plaintiff's claim of lien, should be promptly adjudicated.

While no suggestion or motion was made by counsel for the trustee, he requested two weeks' time in case an order of notice was made to determine what action he should take in the premises.

In the foregoing situation it seems clear that the trustee in bank-

ruptcy has full knowledge of the existence of the plaintiff's claim and the progress of the litigation by which they are seeking to
43 enforce it. Neither the assignee in insolvency or the attaching creditors have now any standing in court. The trustee in bankruptcy does not appear. As no person appears to sustain the exceptions, they are overruled without consideration and the case remanded to the Superior Court. As under the statute the orders of this court are not transmitted until thirty days after they are filed an application by the trustee for leave to appear and to make such motions as he may be advised are proper to protect his interests, if any, in the subject-matter of the suit will be entertained, if made and filed on or before May twenty-second. The legal effect, if any, on the trustee's right to the property of a failure on his part for any reason to appear in this proceeding is not now before the court and has not been considered.

Exceptions overruled nisi.

The opinion of the New Hampshire Supreme Court, as printed in 74 New Hampshire Reports, page 605, is as follows:

Assumpsit to enforce a builder's lien. Transferred from the September Term, 1907, of the Superior Court by Peaslee, J., upon exceptions taken at the trial. The New England Breeders' Club did not appear at the trial, but the case was defended by an assignee appointed in proceedings under the State Insolvency Statute. When the case came on for argument, it appeared that the assignee in insolvency had surrendered the property to a trustee appointed in proceedings in bankruptcy under the Federal Statute and had been discharged as assignee. The trustee in bankruptcy had notice of the proceeding. Neither he nor the defendants of record appearing to sustain the exceptions, they were overruled without consideration.

On April 14, 1908, the trustee filed the following petition to stay the suit of Head & Dowst Company in the United States District Court:

Your petitioner, Nathaniel W. Hobbs, of Concord, in said district, respectfully shows that the New England Breeders' Club was duly adjudged a bankrupt herein on the thirty-first day of December, 1907, upon a petition filed the nineteenth day of April, 1907, and your petitioner, said Nathaniel W. Hobbs, was on the first day of February, 1908, appointed and duly qualified as trustee of the estate of said New England Breeders' Club, in bankruptcy, and is now acting as said trustee, and is in possession of certain real estate and personal property, being all of the estate of said bankrupt; that among the debts scheduled by said bankrupt proceedings is one for $46,000, stated to be due the Head & Dowst Company, a corporation by law established. * * * and that such debt is of such
44 a nature as may entitle said Head & Dowst Company to a mechanic's lien, under the New Hampshire Statute;

That at the time of the filing of the petition upon which said adjudication in bankruptcy was made, a special attachment had been made by said Head & Dowst Company upon the real estate of said New England Breeders' Club, at Salem, in said district, on, to wit,

the twenty-fourth day of December, 1906, for the avowed purpose of securing an alleged lien of said Head & Dowst Company upon said real estate, but no suit to enforce said lien had at that time been entered in court;

That subsequently, on, to wit, the seventh day of May, 1907, said Head & Dowst Company entered in the Superior Court for the county of Hillsborough and State of New Hampshire a suit against said New England Breeders' Club, founded upon the debt aforesaid, for the express purpose of enforcing and foreclosing its alleged lien, and ever since has prosecuted said suit for said purpose in said Superior Court and in the Supreme Court, without the permission of this Honorable Court, and without making your petitioner a party to said suit;

That said Head & Dowst Company is not justly and legally entitled to maintain and enforce its alleged lien upon said real estate, and any pretended right which it may have is founded upon the aid and connivance of agents and servants of the said New England Breeders' Club in order to secure to said Head & Dowst Company an unlawful preference in fraud of the Federal bankruptcy law, and to the great injury of the other creditors of said bankrupt, secured and unsecured;

That your petitioner would be greatly hindered and embarrassed in making a proper defence to said suit in said Superior Court and said Supreme Court, and would be unable to properly avail himself of the provisions of the Federal bankruptcy law with regard to unjust preferences, and if said suit is permitted to continue in said Superior Court and said Supreme Court your petitioner is likely to be hindered and embarrassed in his possession of said bankrupt's estate, and be ousted from his possession thereof;

That said Head & Dowst Company are seeking to obtain judgment against your petitioner as an officer of this Honorable Court, and to that end are seeking to compel him to appeal in said Superior Court, and also in said Supreme Court, of the State of New Hampshire, and to become a party defendant to their suit in order that his rights in said real estate as an officer of this court may be foreclosed and adjudicated in favor of said Head & Dowst Company;

That if such suit is not stayed, your petitioner will be compelled to become a party to said suit in said State courts, or to permit a
45 judgment in rem, to be obtained by default against said real estate so that great and irreparable injury will be done your petitioner as an officer of this Honorable Court, and the other creditors of said bankrupt, and the estate of said New England Breeders' Club.

Wherefore, your petitioner prays that further proceedings in said Superior and said Supreme Courts of New Hampshire may be stayed, pursuant to the bankruptcy laws of the United States in such case made and provided, and that an injunction may be issued out of this Honorable Court, directed to said Head & Dowst Company, restraining it, its agents, servants, attorneys and counsellors, from further prosecuting said suit in said courts, and for such other and further relief as to the court may seem just. (Signature and verification omitted.)

On May 13, 1908, after the opinion of the Supreme Court of May 8, 1908, the trustee filed the following petition for a temporary restraining order:—

A petition for a restraining order against the Head & Dowst Company to stay a suit pending in the courts of the State of New Hampshire having been filed with the clerk of this Honorable Court on the fourteenth day of April, 1908, your petitioner respectfully shows that said Head & Dowst Company are likely to take judgment and levy an execution against said bankrupt estate, or take possession thereof by process of law, before the hearing of said petition, unless the said defendants are, pending such hearing, restrained therefrom.

Wherefore, your petitioner moves this Honorable Court to grant a temporary restraining order against said Head & Dowst Company * * * from taking further action in said suit before the hearing of said petition, or until the further order of the court, conformable to the prayer of said petition. (Signature and verification omitted.)

An informal notice of the filing of this petition and of a hearing thereon was given to counsel for the Head & Dowst Company, and a hearing was had before this court on May 15, 1908, at which counsel for the Head & Dowst Company were present, but appearing only specially and objecting to the issuance of a temporary restraining order. After hearing the court issued the following temporary restraining order:—

Whereas, in the above cause, a motion for the issuance of a permanent restraining order has been filed and it having appeared that there is danger of irreparable injury being caused to the petitioner before the hearing of said application for the permanent re-
46 straining order unless said Head & Dowst Company is, pending such hearing, restrained as herein set forth.

Now, therefore, take notice that you, the Head & Dowst Company, defendant herein, your agents, servants, attorneys and counsellors, and each of you, are hereby specially restrained and enjoined from taking further action in the suit of Head & Dowst Company v. New England Breeders' Club, now pending in the Superior Court and the Supreme Court for the State of New Hampshire, to enforce a lien upon the real estate of said New England Breeders' Club, until further order of this court in the premises. I will hear the Head & Dowst Company under special appearance, and without prejudice as to any question of jurisdiction upon a reasonable notice to the other side, upon an application to dissolve this order. It is intended that the party restrained need not necessarily resort to a motion to dissolve, but may at once exercise the right of appeal. In the meantime, and without prejudice to the rights of either party, the trustee has leave to co-operate with the Head & Dowst Company with a view of selling the property in dispute, and in case of sale upon joint consent the proceeds will be safeguarded and held until the rights of the parties are established by law.

Done at Chambers May 15, 1908.

EDGAR ALDRICH,
U. S. District Judge.

The Head & Dowst Company had notice of this order by being served with attested copy May 18, 1908, and it has never been dissolved, although a petition to dissolve was filed as will subsequently appear.

On June 10, 1908, the trustee filed the following petition to adjudicate an adverse claim:—

Your petitioner * * * represents that he was appointed and duly qualified as trustee * * * on the eighth day of February, 1908, and thereupon he came into possession of a certain tract of land * * * situate in said Salem * * * bounded and described as follows * * * and your petitioner has ever since remained in possession of said real estate, and is now in possession thereof, as an officer of this Honorable Court, and that the title to said real estate is now vested by operation of law in your petitioner as trustee in bankruptcy as aforesaid;

That the Head & Dowst Company * * * claims to have acquired and to hold a mechanic's lien upon all of said real estate, on account of materials furnished and labor performed in erecting buildings on said real estate, and a performance of all necessary acts to entitle it to a lien under the mechanic's lien laws of said State of New Hampshire;

47

That said Head & Dowst Company is not lawfully entitled to a lien upon said property inasmuch as it has not complied with the terms of said mechanic's lien laws of said State of New Hampshire, and because its claim to such lien is based upon certain unauthorized and fraudulent waivers and admissions made by said bankrupt, its agents and officers, and certain preferences and advantages which were given to said Head & Dowst Company in fraud of the Federal bankruptcy laws; and if said lien should be established, it would be a fraud upon your petitioner and the general creditors of said bankrupt, and contrary to the provisions of said Federal bankruptcy laws;

That said pretended claim of the said Head & Dowst Company constitutes a cloud upon the title of said real estate, and in order properly to administer the estate of said bankrupt, and to sell said real estate to the best advantage, it is necessary to ascertain whether said Head & Dowst Company has acquired such lien, or any lien, and if so acquired, the amount and extent thereof.

Wherefore, your petitioner prays that said Head & Dowst Company may be ordered to appear and show the validity and amount of its said lien, if any it may have, in the premises herein before described and that if the said Head & Dowst Company shall fail to appear, its lien, if any, may be discharged, and that said Head & Dowst Company may be forever debarred from asserting said lien in any court; and for such further relief as may seem proper and equitable in the premises, according to the practice of this Honorable Court. (Signature and verification omitted.)

Counsel for the trustee mailed to Burnham, Brown, Jones & Warren, counsel for the Head & Dowst Company, a copy of the foregoing petition on June 10, 1908. Before its receipt by counsel for the Head & Dowst Company, and before they had knowledge of the filing of this petition to adjudicate adverse claim, counsel

for the Head & Dowst Company had prepared and forwarded to the clerk of this court the following petition to dissolve the restraining order of May 15, 1908, which was filed June 11, 1908:—

The Head & Dowst Company * * * under special appearance in the above-entitled cause, and without prejudice as to any question of jurisdiction or otherwise, respectfully represent that on the twenty-fourth day of December, 1906, it brought an action against said club to secure and enforce its lien claim for labor and materials, in the Superior Court for the county of Hillsborough, in said State, returnable at the May, 1907, Term thereof, at-
48 taching on said day the real estate of said club for that purpose; that on the fifth day of February, 1907, certain creditors of said club filed a petition in the Probate Court * * * asking for a decree of insolvency against said club and that said club be declared an insolvent debtor under and by virtue of the New Hampshire laws, so called, existing prior to the passage of the United States Bankruptcy Law; that said Probate Court assumed jurisdiction and decreed said club an insolvent debtor, March 1, 1907, and on the fifteenth day of April, 1907, appointed Nathaniel W. Hobbs * * * assignee thereof; that said company caused its writ on its aforesaid action to be served upon said Hobbs and upon Henry F. Hollis, clerk of said club, on the nineteenth day of April, 1907, notifying them of the pendency of said action, and to appear and defend the same at said May Term, 1907, which they did and continued to appear and defend said club before and at the trial of said action December, 1907; that on the eighteenth day of December, 1907, the judge of said Superior Court, before whom said action was tried, filed his findings in said court awarding said company $46,748.08 and a judgment in rem against all the real estate of said club attached in said action; that afterward, upon request of said club and the assignee thereof, in consequence of exceptions taken at said trial, a case was drawn covering all exceptions taken at the trial aforesaid, and the same was transferred to the Supreme Court for said State; that on the eighth day of May, 1908, said exceptions were overruled by said Supreme Court; that on a petition filed April 19, 1907, in the District Court of the United States for the District of New Hampshire, but which was not acted upon until after December 18, 1907, said club was adjudicated a bankrupt by said District Court December 31, 1907, and said Nathaniel W. Hobbs was appointed trustee in bankruptcy of said club, February 1, 1908; that on the fourteenth day of April, 1908, said Hobbs as trustee in bankruptcy of said club filed in said District Court a petition for a restraining order against said company from taking further action in its said suit in the New Hampshire State courts; that said company was not duly notified of said petition and has never appeared in person or by counsel in said bankruptcy court, or in said State insolvency court; that on the fifteenth day of May, 1908, said District Court temporarily restrained and enjoined said company "from taking further action in the suit of Head & Dowst Company v. New England Breeders' Club * * * until further order * * * "; that it was further stated in said order, "I will hear the Head & Dowst Company under special appearance

and without prejudice as to any questions of jurisdiction upon a reasonable notice to the other side, upon an application to dissolve this order."

49 Your petitioner herewith requests an order of notice to be issued to the other side, returnable at such reasonable time as the court may order, for a full hearing upon all questions of fact and law involved in the right of said company to have said temporary restraining order dissolved. And said company, under said special appearance and without prejudice as to any questions of jurisdiction as granted by said District Court, says that said club was and always has been an amusement corporation and that said District Court has not and cannot have any jurisdiction thereof. (Signature omitted.)

On June 16, 1908, the petition to adjudicate the adverse claim and the petition to dissolve the restraining order were called up in the District Court, counsel for trustee and the Head & Dowst Company being present, but action on each of said petitions was postponed, and has ever since been postponed, because of the pendency of the proceedings to vacate the adjudication of bankruptcy of the New England Breeders' Club.

On March 18, 1909, the Head & Dowst Company filed the following answer to the petition of the trustee of April 14, 1908, to stay the suit of the Head & Dowst Company:—

The defendant under special appearance now and at all time hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:—

1. That on the twenty-fourth day of December, 1906, it brought an action against said club, to secure and enforce its lien claim for labor and materials, in the Superior Court for the county of Hillsborough in said state, returnable at the May, 1907, Term, thereof attaching on said day the real estate of said club for that purpose; that on the fifth day of February, 1907, certain creditors of said club filed a petition in the Probate Court * * * asking for a decree of insolvency against said club * * *; that said Probate Court assumed jurisdiction and decreed said club an insolvent debtor March 1, 1907, and on the fifteenth day of April, 1907, appointed Nathaniel W. Hobbs * * * assignee thereof; that said company caused its writ on its aforesaid action to be served upon said Hobbs and upon Henry F. Hollis, clerk of said club, on the nineteenth day of April, 1907, notifying them of the pendency of said action and to appear and defend the same at said May Term,

50 1907, which they did and continued to appear and defend said club before and at the trial of said action in December, 1907; that on the eighteenth day of December, 1907, the judge of said Superior Court * * * filed his findings in said court awarding said company $46,748.08 and a judgment in rem against all the real estate of said club attached in said action; that after-

ward, upon request of said club and the assignee thereof, in consequence of exceptions taken at said trial, a case was drawn covering all exceptions taken at the trial and the same was transferred to the Supreme Court for said State; that on the eighth day of May, 1908, said exceptions were overruled by said Supreme Court; that on a petition filed April 19, 1907, in the District Court of the United States for the District of New Hampshire, but which was not acted upon until after December 18, 1907, said club was adjudicated a bankrupt by said District Court, December 31, 1907, and said Nathaniel W. Hobbs was appointed trustee in bankruptcy of said club February 1, 1908.

2. That the opinion of said Supreme Court of New Hampshire filed May 8, 1908, is as follows, to wit: (Copy of opinion omitted, as it appears in full on pages 16 and 17 [41] of this report.)

3. Said Head & Dowst Company says that it is justly and legally entitled to maintain and enforce its lien verdict obtained in the Superior Court of New Hampshire; that its right to a lien upon the property of said club was not obtained and is not founded upon the aid and connivance of agents and servants of said club, and is not an unlawful preference of the Federal bankruptcy law or of any law.

4. Said Head & Dowst Company denies that said club, or any legal representative thereof, has been or could be hindered and embarrassed in making a proper defence to said lien suit either in the Superior Court or the Supreme Court of New Hampshire.

5. Said Head & Dowst Company says that neither the petitioner herein, nor anyone has any legal or equitable right to stay the proceeding of the Head & Dowst Company in its suit pending in the Superior Court or the Supreme Court of New Hampshire.

6. Said Head & Dowst Company says that it has never filed or proved any claim in its behalf against said club, either in the Insolvency Court for the State of New Hampshire or in said District Court, or appeared therein in any proceedings, except in this proceeding under special appearance.

Wherefore, said Head & Dowst Company prays that the petitioner's petition and all proceedings thereunder may be dismissed with reasonable costs and charges to said Head & Dowst Company. (Signature and verification omitted.)

On April 29, 1909, the petition of the trustee to adjudicate adverse claim and the motion to dissolve the restraining order came on for hearing in the District Court and upon consent of the
51 parties Burns P. Hodgman was appointed master under the following order:—

On this twenty-ninth day of April, 1909, this cause coming on for further consideration, upon consent of the parties, It is ordered, that Burns P. Hodgman be, and hereby is, appointed master to find and report to the court the material facts relative to the validity of the alleged Head & Dowst lien in the bankruptcy sense.

On August 10, 1909, the above order was amended so as to read as follows:—

Hearing upon question as to scope of order of April 29, 1909. It is ordered that the master hear all material evidence relative to matters alleged in petition of June 10 and June 11, 1908, and that Head & Dowst Company go forward upon the question of the validity of their alleged lien.

Head & Dowst Company except to this order so far as it relates to the petition of June 10, 1908, upon the ground that the company has never appeared under that petition, or generally, in the bankruptcy proceeding and that their only appearance has been special in respect to the restraining order. Head & Dowst Company also except to that part of the order directing Head & Dowst Company to go forward.

As appears from the opinion and rescript of the Supreme Court, no appearance was ever entered in that court in behalf of the trustee in bankruptcy. And it is a fact that the trustee in bankruptcy did not ask nor receive authority from this District Court to appear and defend the Head & Dowst Company suit in the Supreme Court. On the other hand, it is true that the Head & Dowst Company procured from the Supreme Court and served upon the trustee in bankruptcy an order of notice to appear and show cause why he should not become a party defendant to the litigation pending in the Supreme Court. True it is that this order of notice was procured by mistake without first being called to the attention of the court, but, as appears from the opinion of the Supreme Court, the court ruled that counsel could be heard upon the question whether an order of notice should be issued, but counsel for the trustee, beyond making a statement for the information of the court, declined to make any motion or suggestion as to the proper procedure or to object to the issuance of an order of notice.

52 Although it is a fact that the trustee in bankruptcy never obtained consent of this court, nor applied for same, to enter his appearance in the Supreme Court to defend the Head & Dowst Company suit, and although it is a fact that no actual appearance in behalf of the trustee was ever entered in that court, yet the same counsel who had previously appeared and had actually engaged in the trial of the Head & Dowst Company suit in behalf of Hobbs, assignee, was still retained in the employ of Hobbs, trustee, and purported to file a brief on April 7, 1908, in the name of the assignee, in the Supreme Court, when as a matter of fact, the assignee in insolvency had long since previously thereto filed his account as assignee in the Probate Court, and had long since turned over to himself as trustee in bankruptcy, all the property and funds of the Breeders' Club.

Apparently the questions of law prepared by counsel for the assignee in insolvency for argument before the Supreme Court would have been the same questions to be raised in behalf of the trustee. Not only was the assignee in insolvency and the trustee in bankruptcy one and the same person, but counsel for Hobbs, in each of his official capacities, was the same, and it is beyond question that Mr. Hobbs, as trustee, and that his counsel in this capacity, had as full and complete knowledge of the litigation and its

progress as Mr. Hobbs, the assignee and his counsel could have had, and that after the appointment of the trustee they had as complete information as to the Head & Dowst Company claim, and the legal questions therein involved, and its status in the New Hampshire Supreme Court as was possessed by them while Mr. Hobbs was acting as assignee.

It is true, and I should report it to this court, that in the original suit in the Superior Court counsel for the assignee failed to move at the conclusion of the evidence for a non-suit or for a directed verdict, so that the primary exceptions of the assignee, which relate to the verdict found on the evidence and the judgment ordered in accordance therewith, are apparently worthless under recent decisions of the New Hampshire Supreme Court.

With this exception that counsel for the assignee failed to make the proper motions for non-suit or directed verdict, at the conclusion of the evidence in the Superior Court, and thus would be debarred in the State court of maintaining the primary exceptions, I
53 have heard of no suggestions as to how the trustee would have been hindered and embarrassed in making a proper defence to the suit in the State court. Of course at this time, inasmuch as the trustee never entered an appearance in the Supreme Court, it is probable that he can no longer be heard there.

On February 10, 1908, the assignee turned over to the trustee the balance of monies remaining in his hands, and thereafter paid as trustee certain bills which had been incurred by him as assignee. These bills, of course, could relate only to indebtedness incurred prior to February 1, 1908, the date of appointment of the trustee, and might and probably did include payment for printing and transferring the reserved case from the Superior to the Supreme Court, payment to counsel up to and including February 8, 1908, but for services of counsel and other indebtedness incurred subsequent to that date, the trustee must have been properly chargeable. For instance, the brief which was filed in April, 1908, was printed the early part of April and must have been an indebtedness contracted by the trustee, and the same may be said as to services of counsel, rendered subsequent to February 8, 1908, and the conclusion is irresistible that between February 8, and April 7, 1908, the trustee in bankruptcy, although not actually appearing, so far as the Supreme Court records disclosed, was doing and preparing to do what he legitimately could, to defend the Head & Dowst Company litigation in the Supreme Court.

The Head & Dowst Company has not filed or proved any claim against the Breeders' Club in the bankruptcy proceeding, nor has it entered any other than a special appearance in the bankruptcy case. So far as the evidence discloses, the appearance for the Head & Dowst Company has always been made with the qualification that it was special only, and without prejudice as to any question of jurisdiction or otherwise.

The assignee in insolvency and later the trustee in bankruptcy took physical possession of all the land that was covered by the deed of Andrew Miller to the Breeders' Club, and this possession

has ever since continued, the trustee having collected certain rents and having sold the standing grass from time to time.

In the earlier part of this report, I have stated the substance of an interview between Mr. Jones, representing the Head & Dowst
54 Company, and Mr. Miller, purporting to represent the Breeders' Club as its president, and I have given copies of Mr. Miller's letters and telegram, and so far as it if a question of fact, I fail to find evidence sufficient to sustain a finding that it was the intent of Mr. Miller to give preference to Head & Dowst Company over other creditors of the Breeders' Club or that there was any aid or connivance on the part of the agents and servants of the Breeders' Club to secure to said Head & Dowst Company an unlawful preference in fraud of the bankruptcy law.

Briefly stated, my conclusions are, so far as it is for me to determine (1) that the motion of the Head & Dowst Company, filed June 11, 1908, to dissolve the restraining order entered by this District Court on May 15, 1908, should be granted, and (2) that if it is held that this court has the right, by summary process, under the peculiar circumstances of this case, to compel the Head & Dowst Company to adjudicate its lien claim in this court, the Head & Dowst Company should have judgment for $45,995.02 exclusive of interest, and a judgment in rem against all the property described in the deed of Andrew Miller to the New England Breeders' Club.

Respectfully submitted.

BURNS P. HODGMAN, *Master.*

(10) *Trustee's Exceptions to the Amended Report of Master.*

[Filed December 10, 1909.]

*District Court of the United States, District of New Hampshire.

No. 1253. In Bankruptcy.

In the Matter of THE NEW ENGLAND BREEDERS' CLUB, Bankrupt.

In re HEAD & DOWST COMPANY CLAIM.

Comes now Nathaniel W. Hobbs, trustee in bankruptcy of the New England Breeders' Club, and excepts to the findings of
55 fact and conclusions of law filed herein, by Burns P. Hodgman, special master herein, in the following particulars, to wit:—

1. The trustee excepts to the legal conclusions and attempted exercise of discretion embodied in the final paragraph of the report, on the ground that the master has stepped without the scope of the order of the court, by which he was appointed master, and which reads as follows:—

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*This heading,—the Court and Title of case,—being repeated in papers marked (12), Affidavit of Henry F. Hollis, (13), (14), (15) and (16), is omitted in printing them. FRANCIS M. FOGARTY, *Clerk.*

District Court of the United States, District of New Hampshire.

No. 1253. In Bankruptcy.

In the Matter of THE NEW ENGLAND BREEDERS' CLUB, Bankrupt.

Order of Court Appointing Master.

ALDRICH, *J.*:

On this twenty-ninth day of April, 1909, this cause coming on for further consideration, upon consent of the parties, It is ordered that Burn P. Hodgman be, and he hereby is, appointed master to find and report to the court the material facts relative to the validity of the alleged Head & Dowst lien in the bankruptcy sense.

By the Court:

BURNS P. HODGMAN, *Clerk.*

2. The trustee excepts to the finding of the master, on page 12, of this report, that the Head & Dowst Company was warranted "in abandoning further work under the contract and from proceeding further with the construction work."

The trustee excepts to said finding on the ground that the finding is not in any proper sense a finding of fact, but on the contrary, such finding calls for a legal conclusion, and is outside the scope of the master's authority as defined by the court's order of April 29, 1909, under which the matter is proceeding. Under the terms of the order the master has no authority to make and report conclusions of law, but is confined to finding and reporting the facts alone.

3. The trustee excepts to the admission in evidence, by the master, of a letter from the architect to the Head & Dowst Company, dated September 29, 1906, marked "Head & Dowst, Exhibit
56 No. 45," in which the architect stated that he had sent a certificate for $25,000 to the Breeders' Club.

The trustee excepts on the ground that the architect was not, under the terms of the contract, the agent of the Breeders' Club for any purpose. Any communication from him or statements made by him to the Head & Dowst Company are hearsay and therefore incompetent. The trustee further excepts on the ground that the letter is not an admission made by an authorized agent of the Breeders' Club.

4. The trustee excepts to the finding of the master, on page 10*b*, [35], of his report, that "a certificate for at least $25,000 was actually sent to and received by the New England Breeders' Club.

The trustee excepts on the ground that this finding was made on the strength of evidence that is inadmissible, and incompetent for any purpose as against the trustee. The architect was not, under the terms of the contract, the agent of the New England Breeders' Club for any purpose. Any communication from him or statements made by him to the Head & Dowst Company are hearsay, and therefore incompetent. The trustee further excepts on the ground that

the letter of September 29, 1906, written by Peters & Rice to the Head & Dowst Company, *it* is not an admission made by an authorized agent of the Breeders' Club, and on further ground that a finding that such a certificate was actually received by the New England Breeders' Club is pure assumption on the part of the master, neither the certificate itself nor any competent evidence having been introduced upon which such finding can be supported.

Respectfully submitted,

NATHANIEL W. HOBBS, *Trustee*,
By His Attorney, HENRY F. HOLLIS.

December 9, 1909.

(11) *Opinion of the District Court.*

January 6, 1910.

ALDRICH, *J.*:

This case comes up now upon two motions, as well as upon exceptions to the master's report. The Head & Dowst Company
57 moves to dissolve the injunction, and the trustee moves to have the validity of the Head & Dowst lien adjudicated in this court as an adverse claim.

April 19, 1909, and after the decision upon the jurisdiction question in the Court of Appeals (169 Fed. Rep. 586), a master was appointed to find material facts relative to the validity of the alleged Head & Dowst lien. Under a liberal construction of the order, the master gave a full hearing, and made findings both as to the merits of the alleged lien and the status of the lien suit pending in the State courts prior to the adjudication in bankruptcy.

I shall only consider at this time questions which relate to the finding in respect to prior pendency of the lien suit in the New Hampshire courts.

The proceeding against the Breeders' Club to secure and enforce an alleged lien, for labor and materials, was instituted in the Superior Court of the State December 24, 1906, in which judgment in rem was rendered for about $47,000, and insolvency proceedings under the State insolvency laws were instituted February 5, 1907, in the Probate Court, and an assignee was appointed.

Contrary to impressions tentatively expressed at the oral arguments, I have reached the conclusion that I ought to deny the application, at this stage of the proceedings, to adjudicate here the Head & Dowst claim, and decline to continue the injunction in its present form.

Apparently certain material questions, raised by exceptions and a reserved case from the Superior to the Supreme Court of the State, as to the validity of the lien have not been passed upon or even considered by the Supreme Court of New Hampshire, and apparently the final result reached there was based upon the failure of the parties to present their case in that tribunal, and apparently such failure resulted from a mistake or misunderstanding of the parties in respect

to doubtful jurisdictional questions and other doubtful questions relating to the powers and duties of the different courts under the bankruptcy law. The merits of the alleged lien not having been determined upon consideration, but as upon default which resulted from mistake or misunderstanding in respect to remedies and procedure relating to the same subject-matter pending in the two courts,

58 nothing which is here said is to be accepted as a denial of the right of the Federal court to deal with the alleged lien in case the parties shall fail in their efforts in the State courts to have their questions in respect to the amount and validity or invalidity of the alleged lien settled in the State courts upon a consideration of the merits. In view of the pending bankruptcy proceeding in the Federal court in which a trustee had been appointed, quite likely the Head & Dowst Company should have resorted to the Federal court for leave to cite the trustee into the proceeding pending in the State court rather than to compulsory process upon him from that court to that end, relying upon the idea, as they doubtless did, that the prior pendency of the lien proceeding in the State court relieved the Federal bankruptcy court from all responsibility in respect to the question where the rights of the bankruptcy trustee should be adjudicated.

At the time this action was taken in respect to the process of the State court the Head & Dowst Company was stoutly contending that the New England Breeders' Club, being a corporation, and one not engaged to any extent in mercantile pursuits, its insolvent estate was not within the purview of the Federal bankruptcy law; and it is probable that the State court held that view. The counsel for the trustee stoutly contended for the contrary view. Upon application, and upon the theory that the Head & Dowst Company was seeking to establish a right in the State court which would operate as a fraudulent preference not countenanced by the Federal law, the trustee sought a restraining order upon the Head & Dowst Company, which was granted without prejudice as to any question of jurisdiction, and subject to an application at any time for dissolution.

At a subsequent hearing, holding the view that the Federal court was without jurisdiction, because the Breeders' Club was not principally or at all engaged in trading or mercantile pursuits, and that it was not a corporation whose insolvent affairs were within the bankruptcy law, I ordered the bankruptcy proceedings dismissed. This was done subject to exception; and, in order to hold the rights of the parties in respect to the alleged lien in statu quo, the execution of the order of dismissal was stayed pending review by the Court of

59 Appeals. The order of dismissal was sub-equently reversed by the Court of Appeals (In re New England Breeders' Club, 169 Fed. Rep. 586), and we therefore now have an estate with which we must deal under the Federal bankruptcy law, none of the parties interested seeking to bring themselves within the conditions or qualifications, in respect to jurisdiction, expressed in the opinion of the Court of Appeals.

Until an authoritative decision upon the disputed jurisdictional points, the parties were necessarily at open sea in respect to their

remedies. Acting upon the idea, as the trustee was, that the estate was one for Federal bankruptcy adjudication, a contention which has been sustained by an authoritative court, he was probably right in not responding to the compulsory process invoked by the Head & Dowst Company to compel his attendance in the State court. But, whether he was right or wrong, the fact that he failed to appear, and for that reason that the State court declined to consider the exceptions and objections to the lien therein pending, furnishes no sufficient reason why the meritorious status of the alleged lien under the state law should not be determined by some court before a judgment in rem shall operate upon and absorb the entire bankrupt estate now in the custody of the Federal bankrupt law. It would seem reasonable that the question where the rights shall be ascertained and established should be determined now, as it would have been if, when it first arose, all parties and both courts had understood that the estate was one to be settled in the course of bankruptcy proceedings.

The lien in controversy, if there is one, results from the New Hampshire statute, and whether it is a valid lien which attaches itself to the real estate in question is to be determined by New Hampshire law. The question whether the lien does or does not attach in this particular case will quite likely involve a consideration of decided cases of statutory interpretation and application to particular and perhaps analogous situations by the courts of the State. The nature of a lien claim being such that, if there is a lien, it attaches by operation of law under a given statute, questions about it are peculiarly questions to be governed by local law. The trustee does not now urge any claim of fraudulent preference, and a lien like the one in question, if established, would not operate as such. Remington on Bankruptcy, §1155, and cases cited. The only point
60 now urged against the validity of the lien is non-fulfillment and wilful abandonment of a written contract.

If it should be found that there is a decision by the highest court of the State which in fact and law would apply itself to a situation like this, or is so closely analogous as to apply by reasonable implication, it would have to be accepted as binding here. In other words, the Federal court is bound to establish the rights of the parties according to the State law as interpreted by the State courts, and this, as said, is especially true in cases where the rights rest upon interpretations of local statutes.

The suit in the State court, which was one, according to the theory of the Head & Dowst Company, to establish, through proper procedure, a lien which had already attached itself by operation of law, was pending at the time of the adjudication in bankruptcy, and the property of the Breeders' Club was in the possession of an assignee appointed under the insolvency law of New Hampshire. Under such circumstances, and in the absence of a clear and imperative rule of Federal bankruptcy law which requires it to be done, it would seem to be a judicial work of supererogation for the Federal court to seize and hold a lien question like the one here, which must be decided according to local law as interpreted by the State courts,

when the question is ripe for decision in a pending cause by a court of the State of competent jurisdiction.

An examination of the State and Federal cases decided in the periods covered by the various bankruptcy acts discloses a vast field of discussion, and quite a degree of confusion and conflict, as to the respective powers and duties of the two courts; but, after all, it would seem to be safe to assume that there is no hard and fast rule which requires that all litigation pending in the State courts at the time of the adjudication in bankruptcy in respect to the property of the bankrupt estate, shall be left for determination in that forum; neither, as it would seem, is there a hard and fast rule which requires a Federal court to draw unto itself all litigation in respect to a bankrupt estate and as to property in the possession of the bankrupt trustee. As the Federal bankruptcy law is supposed to be the paramount insolvency law, and as the estate upon adjudication is understood to become an estate in custodia legis, it is quite possible that in the last analysis it might be found (except as to situations within the doctrine of Eyster v. Gaff, 91 U. S. 521, and other
61 cases cited in notes §1582, Remington on Bankruptcy) that the right or power to assume the responsibility of all litigation in respect to the assets of the bankrupt estate resides in the Federal bankruptcy court. Still, if such extreme power exists, reasonable consideration of comity between the two governments and the two courts, and a reasonable consideration of convenience to suitors, would doubtless, under reasonable judicial discretion, often require that it should not be exercised, and in the great majority of cases would leave local property rights, involved in litigation pending in State courts of general jurisdiction at the time of the adjudication in bankruptcy, to be ascertained and established in the State tribunal as the one most appropriate and best suited to the interests of all parties concerned.

Where there is concurrent jurisdiction the court that first takes hold of the res in a controverted situation may hold the ground. If the extreme view were conceded, that Federal law is supreme in the sense that, as it takes to itself the entire estate in bankruptcy, it may take with it all litigation, it of course cannot be said, in the strict technical sense, that the jurisdictions of the two courts are concurrent, yet in all substantial senses they are concurrent, and either is a suitable tribunal to deal with the subject-matter of a lien. It seems quite unnecessary in a situation like this to undertake to determine what might not be done in an extreme case. Courts are traditionally inclined to be cautious in dealing with questions tending in the direction of a conflict or jurisdiction. With our complex system of close relationship and responsibility between State and Federal courts, under which the two courts are oftentimes and necessarily charged with responsibility in respect to the same subject-matter, the historical and traditional reasons for caution and comity are emphasized in a very decided degree.

It would seem that this question is one which may well be left with the local court which had jurisdiction of the subject-matter prior to the proceeding in bankruptcy. There would seem to be no

doubt of the power of the bankruptcy court, on application or even without it, to direct the trustee to go there and present his case. (See, as having more or less bearing upon different phases of the questions presented, cases cited in notes to §§1584, 1585, 1586, 1587, 1796, 1797, 1798, Remington on Bankruptcy.) If the lien is valid, the trustee in bankruptcy takes the property subject to it.

62 Whatever court takes hold of it, whether or not it is valid, and if valid to what amount, is something which must be determined under New Hampshire law. The exact and only question is the status of the lien under New Hampshire law. The parties are entitled to have that question passed upon by some suitable court. To reach the New Hampshire law upon a local question in respect to a local statute is the ultimate result to be attained, and what court could be a more appropriate or suitable exponent of the New Hampshire law upon such a question than the highest court of the State?

There is no occasion at this stage of the proceeding to consider under what process the judgment of the State court, if Head & Dowst shall succeed in securing one, shall operate upon the property in question—that is to say, whether a judgment in rem, if obtained, should be brought here in aid of the bankruptcy proceeding, or whether it should be left to the lien holder to execute the judgment under State process.

Let the order be: The injunction is so far modified as to permit the Head & Dowst Company to go before the proper court of New Hampshire, and take necessary steps to have all questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law; and the trustee in bankruptcy has leave, and is directed, to make all reasonable effort in the direction of having such questions established by that court. The motion of the trustee that the lien claim be adjudicated by this court is stayed for the present, and will await the result reached in the State court.

(12) *Motion of Nathaniel W. Hobbs, Trustee in Bankruptcy of the New England Breeders' Club, Renewing His Petition of June 10, 1908, to Have the Validity and Amount of the Alleged Lien of the Head & Dowst Company Adjudicated in the United States District Court for the District of New Hampshire.*

[Filed March 15, 1910.]

Nathaniel W. Hobbs, trustee in bankruptcy of the New England Breeders' Club, presents herewith a certified copy of the opinion of the New Hampshire Supreme Court in Head & Dowst Com-

63 pany v. New England Breeders' Club, rendered March 1, 1910, together with a certified copy of the docket entries in said case since January 6, 1910, a copy of a petition addressed to said New Hampshire Supreme Court, under date of January 10, 1910, by Burnham, Brown, Jones & Warren, counsel for the Head & Dowst Company, and a copy of their letter accompanying same.

and an affidavit showing what proceedings have been taken in the State courts since the opinion rendered by Mr. Justice Aldrich on January 6, 1910, and respectfully renews his petition on June 10, 1908, to have the validity and amount of the alleged lien of the Head & Dowst Company adjudicated in the United States District Court for the District of New Hampshire.

NATHANIEL W. HOBBS, *Trustee*,
By His Attorney, HENRY F. HOLLIS.

Dated at Portsmouth, N. H., March 15, 1910.

No. 675. Hillsborough.

HEAD & DOWST CO.
v.
NEW ENGLAND BREEDERS' CLUB.

Assumpsit to enforce a builder's lien. Trial in the Superior Court at the September Term, 1907, before Peaslee, J., who transferred the case. Verdict for the plaintiffs.

Burnham, Brown, Jones & Warren, for the Plaintiffs.
Henry F. Hollis, for the Defendants.

BINGHAM, *J.*:

This is an action of assumpsit brought to enforce a builder's lien under Sects. 10, 16 and 17 of Chapter 141 of the Public Statutes, for labor performed and materials furnished in the construction of certain buildings and appurtenances. In the Superior Court a general verdict was found for the plaintiffs and a judgment in rem was ordered against all the land described in a certain deed to the defendants including the buildings and appurtenances constructed thereon by the plaintiffs. The verdict being general it is to be assumed that the trial court found that the plaintiffs performed labor and furnished materials in the construction of buildings and appurtenances on the defendants' land under a contract, and that the defendants were owing them therefor at the time the suit was brought the sum awarded; that the attachment was made within ninety days from the last rendition of services or furnishing of materials
64 under the contract; and that such other facts were found as were essential to the creation and preservation of the lien. Noyes v. Patrick, 58 N. H. 618.

The defendants did not move in the Superior Court for a nonsuit or a verdict before the case was submitted to the trial judge for decision or at any other time. They made no requests for special findings of fact or rulings thereon either before the case was submitted or before it was transferred to this court, and no such findings or rulings were made or reserved for consideration here. They did, however, except to the verdict and judgment, and to the admission of certain evidence. The questions raised by those exceptions were transferred to this court and were in order for argument at the May

session, 1908, but as no one appeared to support them, and as it was suggested that the defendants were in bankruptcy and that a trustee had been appointed, the court declined to proceed with the case until the trustee was notified, and of its own motion ordered notice to the trustee of the pendency of the suit. Thereafter, the trustee declining to appear, the exceptions were overruled as upon default. Head & Dowst v. New England Breeders' Club, 74 N. H. 605. At the February session, 1910, the trustee appeared and asked to have the order made at the May session, 1908, stricken off, to be heard upon the exceptions taken to the admission of evidence, and upon certain questions relating to the sufficiency of the evidence to support the verdict on the assumption that they were raised by the exception taken to the verdict and judgment. The order was stricken off and he was heard upon the questions raised by the record the same as the original defendants would have been. This was the extent of his legal right. Cogswell v. Railroad, 68 N. H. 192, 195. The question then which we will first consider is whether it would have been open to the defendants to question the legal sufficiency of the evidence to support the verdict under the general exception taken thereto.

It is well settled in this State that a party cannot question the sufficiency of evidence to support a verdict or material issue in a case by a motion after the case has been submitted to the court or jury, or by an exception to the verdict; that after the evidence is closed and the case has been submitted the presumption is that any deficiency in the evidence is capable of being supplied, unless the facts presented by the record disclose that it cannot be; that a party cannot lie by until after his adversary has lost the opportunity of supplying the omission and then for the first time call it in question by motion or exception, and that if he does he waives the objection. Tilton v. Tilton, 74 N. H. 602; Farnham v. Anderson, 74 N. H. 405; Coles v. Railroad, 74 N. H. 425. The defendants therefore take nothing by this exception.

65 Furthermore as all facts essential to the creation and preservation of the lien have been found for the plaintiffs the questions which the defendants seek to raise relating to the validity of the lien are eliminated; for the premises upon which they are based are wholly wanting.

It is conceded that Miller was the president of the defendants, the Breeders' Club. Certain statements made by him with reference to transactions between the plaintiffs and defendants were admitted in evidence as admissions of the defendants, and they excepted. Their exception was based upon the ground that it did not appear that Miller had any authority in the premises, but the record discloses that there was evidence from which it could have been found that the entire management of the business relations between the plaintiffs and the defendants had been given over to Miller and that as respects them he was the club.

Exceptions overruled.

I certify that the foregoing opinion was rendered on the first day of March, 1910.

[SEAL.] A. J. SHURTLEFF, *Clerk.*

STATE OF NEW HAMPSHIRE:

Supreme Court, Term, 1910.

675.

HEAD & DOWST
v.
NEW ENGLAND BREEDERS' CLUB.

Docket Entries.

Burnham, Brown, Jones & Warren.
Jan. 12, 1910.—Henry F. Hollis, for Hobbs, Tr. in Bankruptcy.
Jan. 10, 1910.—Motion by plaintiffs to bring forward.
The court will hear the parties at the opening of the February session as to the present status of the case.
February 1.—Hearing.
Tuesday, February 8, 1910, at 10 A. M., the court will hear argument upon the motion of the trustee in bankruptcy to bring forward the action and to strike off the order "exceptions overruled." Upon this motion the parties may argue the validity of the exceptions transferred by the case. The parties may also be heard further at this time upon the motion of the trustee in bankruptcy to recommit the case.
February 8.—Hearing.
March 1, 1910.—Bingham, J., Defendant's exceptions overruled.

66 I hereby certify that the foregoing is a true copy of the docket entries in the above-entitled action.
[SEAL.] Attest: A. J. SHURTLEFF, *Clerk.*

STATE OF NEW HAMPSHIRE,
Supreme Court:

HEAD & DOWST COMPANY
v.
NEW ENGLAND BREEDERS' CLUB.

The Head & Dowst Company respectively represents that the above-entitled action was entered in said Supreme Court February 4, 1908, and the defendant's exceptions were overruled May 8, 1908, without consideration, as appears in Head & Dowst Company v. New England Breeders' Club, 74 N. H. 605; that before thirty days expired for the certifying back to the Superior Court, where said action was tried, the record of the Supreme Court, the trustee in bankruptcy procured from the United States District Court for the State of New Hampshire a temporary injunction against the Head & Dowst Company from taking further proceedings in the State courts for New Hampshire; that upon a motion by said Head & Dowst Company in said District Court to have said temporary injunction dissolved a master

was appointed to hear and report all facts involved in the petition for said injunction and the motion to dissolve the same; that said master, after a hearing, reported to said District Court his findings thereon; that said District Court, after hearing the parties orally and in writing upon the questions involved in said master's report, filed in said District Court his opinion and orders thereon, a copy of which is hereto annexed.

Wherefore, your petitioner prays that said action may be brought forward in said Supreme Court and such action taken therein as may be required by the opinion and order of said District Court.

JANUARY 10, 1910.

A. J. Shurtleff, Esquire, Clerk, Supreme Court, Concord, N. H.

BROTHER SHURTLEFF: We enclose herewith a motion or petition in the matter of the Head & Dowst Company v. New England Breeders' Club, which we would like to have you call to the attention of Chief Justice Parsons for such orders thereon as he may deem necessary to be made.

We are sending a copy of this letter, together with a copy of the motion or petition without the opinion attached thereto, to
67 Henry F. Hollis, attorney of record for the trustee in the United States District Court. He undoubtedly has a copy of the opinion.

Very truly yours,

(Signed) BURNHAM, BROWN, JONES & WARREN.

Affidavit of Henry F. Hollis.

I, Henry F. Hollis, of Concord, in said District of New Hampshire, on oath depose and say: I am counsel for Nathaniel W. Hobbs, trustee in bankruptcy of the New England Breeders' Club, bankrupt.

After the opinion rendered by Mr. Justice Aldrich regarding the matter of the Head & Dowst Company claim to a mechanic's lien rendered January 6, 1910, I received from Burnham, Brown, Jones & Warren, counsel for the Head & Dowst Company, copies of a letter and of a petition addressed to the Supreme Court of New Hampshire, under date of January 10, 1910, copies of which are hereto annexed.

On January 12, 1910, as counsel for the trustee in bankruptcy, I addressed the following letter to the clerk of the Supreme Court:—

CONCORD, N. H., *January* 12, 1910.

A. J. Shurtleff, Clerk, Supreme Court, Concord, N. H.

DEAR MR. SHURTLEFF: I have received from Burnham, Brown, Jones & Warren, a copy of their letter to you of January 10th, and also a copy of their motion or petition in the matter of the Head & Dowst Company v. New England Breeders' Club.

By direction of the United States District Court for the District of New Hampshire, I am ready on behalf of Nathaniel W. Hobbs,

Esq., Trustee in Bankruptcy of the New England Breeders' Club, to make all reasonable effort in the direction of having the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law before the proper court of New Hampshire. To that end I enclose herewith a written request to have my appearance entered in the Supreme Court for the Trustee in Bankruptcy, and I have also requested the Clerk of the Superior Court for the county of Hillsborough to enter my appearance in that court for said Trustee in Bankruptcy.

68 I should be glad to be notified of any orders that may be made in this matter.

I have sent a copy of this letter to Burnham, Brown, Jones & Warren, counsel for the Head & Dowst Company.

Sincerely yours,

HENRY F. HOLLIS,

At the same time I wrote to the clerk of the Superior Court for the county of Hillsborough to enter my appearance in that court for said trustee in bankruptcy.

At the same time I wrote to counsel for the Head & Dowst Company as follows:—

CONCORD, N. H., *January* 12, 1910.

Burnham, Brown, Jones & Warren, Manchester, New Hampshire.

GENTLEMEN: I have received a copy of your letter of January 10th to A. J. Shurtleff, Clerk of the Supreme Court, also a copy of your motion or petition enclosed to Mr. Shurtleff in the matter of the Head & Dowst Company v. New England Breeders' Club.

By direction of Judge Aldrich I have entered my appearance for Nathaniel W. Hobbs, Trustee in Bankruptcy, of the New England Breeders' Club in the case of Head & Dowst Company v. New England Breeders' Club, in both the Supreme Court of New Hampshire and the Superior Court for the County of Hillsborough.

I have also notified the Clerk of the Supreme Court that I am ready to make all reasonable effort in the direction of having the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law before the proper court of New Hampshire. I enclose herewith a copy of my letter to the Clerk of the Supreme Court.

You will recall that you took the position in your brief filed in the New Hampshire Supreme Court in the Head & Dowst Company v. New England Breeders' Club, that the defendant had failed to make the proper motions in the Superior Court to raise any "primary" exceptions so that the only matters reserved for the consideration of the Supreme Court were the exceptions to the admission and exclusion of evidence.

I believe that it will be impossible for the New Hampshire Supreme Court to pass upon the merits of the amount and validity of the alleged lien of the Head & Dowst Company upon the bankrupt estate of the New England Breeders' Club under the reserved case

in its present form. I believe that an application should be
69 made to Judge Peaslee, who tried the case in the Superior Court for the County of Hillsborough, to make findings of fact and rulings of law and grant proper exceptions to the Trustee in Bankruptcy so that the merits of the said alleged lien may be fairly determined and so that said Trustee in Bankruptcy may be given an opportunity to meet the real issues in the case squarely and equitably.

As the matter now stands before the New Hampshire Supreme Court upon the printed reserved case, there are substantially no findings of fact or rulings of law, but there is merely a finding of a verdict in favor of the plaintiff and the evidence is reported in full. Even if the Supreme Court should consent to consider the case as if a motion for a non-suit or a directed verdict had been duly filed, the merits of the case would not be fairly and equitably raised for the decision of the Supreme Court.

It seems to be encumbent upon the Trustee in Bankruptcy to make reasonable effort to have these questions determined in the New Hampshire Court upon their merits, and I make these suggestions for that reason.

Sincerely yours,

HENRY F. HOLLIS.

On January 14, 1910, I received a notice from the clerk of the Supreme Court that "the court will hear the parties at the opening of the February session as to the present status of the case.

At the opening of the February session of the Supreme Court (February 1, 1910), George H. Warren, Esquire, of counsel for the Head & Dowst Company, made a statement of the case as he understood it, giving his understanding of the status of the case and of the opinion of the United States District Court.

The Chief Justice then gave me permission to appear as counsel for the trustee in bankruptcy. I thereupon moved that the action be brought forward, and that the order "exceptions overruled" be stricken off. To these motions Mr. Warren made no objections, his position being that the default should be stricken off, and the case proceed to argument upon the reserved case as it appeared in May, 1908.

I then stated that the Federal court had given permission to the Head & Dowst Company "to go before the proper court of New Hampshrire, and take necessary steps to have all questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law and the trustee in bankruptcy has leave, and is directed to make all reason-
70 able efforts in the direction of having such questions established by that court.

I further expressed to the court my belief that the reserved case as sent up by Judge Peaslee did not contain sufficient findings of facts, or rulings of law, to enable the Supreme Court to decide the questions involved upon their merits; that it was claimed by

plaintiff's counsel that defendant's counsel failed to make the proper motions and take the necessary exceptions to raise the real legal questions for the decision of the Supreme Court; that Judge Peaslee had transferred all the evidence, stating that upon the evidence he had found for the plaintiffs and ordered a judgment in rem against the property, and that the defendants excepted to the verdict and to the judgment in rem.

I then moved that the case be recommitted to the Superior Court for findings of fact and rulings of law, which would present to the Supreme Court the legal questions involved. I asked counsel for plaintiff to assent to such recommittal, but he refused his assent.

The court then took the matter under advisement and subsequently entered the following order:—

Tuesday, February 8, 1910, at 10 A. M., the court will hear argument upon the motion of the trustee in bankruptcy to bring forward the action and to strike off the order "exceptions overruled." Upon this motion the parties may argue the validity of the exceptions transferred by the case. The parties may also be heard further at this time upon the motion for the trustee in bankruptcy to recommit the case.

In accordance with said order, on February 8, 1910, I argued the foregoing motions and also the exceptions raised by the reserved case. Counsel for the Head & Dowst Company opposed the motion of the trustee in bankruptcy to recommit the case for findings of fact and rulings of law so that the merits of the case might be raised for the consideration of the Supreme Court.

I have used every effort in the direction of having the questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law by the New Hampshire courts. Through the failure of counsel for the assignee in insolvency to make the proper motions and requests and to take proper exceptions, the questions relating to the amount and validity of the Head & Dowst Company lien have not been determined upon their merits in said New Hampshire courts. The arguments of counsel before the New Hampshire Supreme Court, February 8, 1810, were taken down in shorthand and have been written out; the transcript will be produced at the hearing herein.

71 I annex to this affidavit a copy of the opinion of the Supreme Court of New Hampshire, rendered March 1, 1910, in Head & Dowst Company v. New England Breeders' Club, and a copy of the docket entries in said case since January 6, 1910, as well as copies of the motion of the Head & Dowst Company and of their letter to the clerk of the Supreme Court.

HENRY F. HOLLIS.

DISTRICT OF NEW HAMPSHIRE,
Merrimack, ss:

Personally appeared the above-named Henry F. Hollis and made solemn oath that the above affidavit by him subscribed is true.

Before me,

ROBERT C. MURCHIE,
Justice of the Peace.

(13) *Opinion of the District Court.*

March 19, 1910.

ALDRICH, *J.:*

In view of what appears from the various opinions in the State Court in respect to the Head & Dowst Company proceeding, as supplemented by arguments and by the facts found by Burns P. Hodgman, master, I am disposed to accept the result reached in the State court as sufficiently establishing the amount and validity of the Head & Dowst Company lien, and therefore decline to independently consider and adjudicate the local lien question further than to accept as conclusive the result reached in the State court.

The trustee having signified a desire to have my decision in this regard reviewed by the Court of Appeals, I wish, so far as I may properly do so, to send to that court all questions of discretion. Pending this review the Head & Dowst Company should not move the State court to perfect its lien.

(14) *Decree.*

March 19, 1910.

At Concord, in said district, on the nineteenth day of March, A. D. 1910, upon the petition of Nathaniel W. Hobbs, trustee in bankruptcy, filed June 10, 1908, that the alleged lien of the Head & Dowst Company be adjudicated in said District Court, and renewed by motion filed March 15, 1910,

72 Now, therefore, after hearing arguments of counsel, and after due consideration of the same, and of the facts reported to the court by Burns P. Hodgman, master, It is hereby ordered and decreed that said petition of Nathaniel W. Hobbs, trustee, be and hereby is, dismissed and denied.

Witness, the Honorable Edgar Aldrich, judge of said court, and the seal thereof, this nineteenth day of March A. D. 1910.

BURNS P. HODGMAN, *Clerk.*

(15) *Appeal from Order and Decree Entered March* 19, 1900.

[Filed and Allowed March 29, 1910.]

Now comes Nathaniel W. Hobbs, trustee in bankruptcy in the New England Breeders' Club, being aggrieved by the order and

decree entered March 19, 1910, on the petition of said Nathaniel W. Hobbs, trustee, that the alleged lien of the Head & Dowst Company be adjudicated in said District Court, and does hereby appeal from the said order and decree to the Circuit Court of Appeals for the First Circuit, and prays that said appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order and decree are made, duly authenticated, and including the report of Burns P. Hodgman, master, may be sent to the said Circuit Court of Appeals for the First Circuit.

NATHANIEL W. HOBBS,
Trustee in Bankruptcy.

March 29, 1910.

March 29, 1910.
Allowed:
E. A., *Presiding Judge.*

(16) *Assignment of Errors.*

[Filed March 29, 1910.]

Comes now Nathaniel W. Hobbs, trustee in bankruptcy of the New England Breeders' Club, and files the following assignment of errors, upon which he will rely on his appeal from the order and decree made by this Honorable Court on the nineteenth day of March, 1910, in the above-entitled cause:—

1. The court erred in dismissing and denying the petition of said Nathaniel W. Hobbs, trustee, that the alleged lien of the Head & Dowst Company be adjudicated in said District Court.

73 2. The court erred in accepting the result reached in the State court as sufficiently establishing the amount and validity of the Head & Dowst Company lien.

3. The court erred in declining independently to consider and adjudicate the local lien question further than to accept as conclusive the result reached in the State court.

NATHANIEL W. HOBBS, *Trustee.*

(17) *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Head & Dowst Company, a corporation duly established by law and doing business in Manchester, in said District, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fifth day of April next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of New Hampshire wherein Nathaniel W. Hobbs, of Concord in said district, as he is trustee in bankruptcy of the estate of New England Breeders' Club, is appellant, and you are appellee, to show cause, if any there

be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edgar Aldrich, Judge of the District Court of the United States for the District of New Hampshire, this twenty-ninth day of March, in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

EDGAR ALDRICH,
United States District Judge.

Acknowledgment of Service on Citation.

MARCH 29, 1910.

Due and sufficient service of the within citation is hereby accepted.

HEAD & DOWST COMPANY,
Appearing Specially by Its Attorneys,
BURNHAM, BROWN, JONES & WARREN,
GEO. H. WARREN, *Manchester, N. H.*

74 (18) *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of New Hampshire, ss:

I, Burns P. Hodgman, Clerk of the District Court of the United States for the District of New Hampshire, certify that the foregoing are true copies of the following papers on file in the clerk's office of said court in the cause in bankruptcy.

No. 1253.

In re NEW ENGLAND BREEDERS' CLUB, Bankrupt.

Trustee's Petition to Stay Suit,
Trustee's Petition for Restraining Order,
Temporary Restraining Order,
Trustee's Petition to Adjudicate Adverse Claim,
Petition of Head & Dowst Company,
Answer of Head & Dowst Company,
Order of Court Appointing Master,
Order of Court as to Master,
Master's Report,
Trustee's Exceptions to Master's Report,
Opinion of the District Court of January 6, 1910,
Renewal of Trustee's Motion to Adjudicate Head & Dowst Company Claim,
Opinion of District Court of March 19, 1910,
Decree of District Court of March 19, 1910,
Petition for Appeal,
Assignment of Errors,

and also the original Citation issued upon the appeal of Nathaniel W. Hobbs, trustee in said matter, with the Acceptance of Service thereof.

And I further certify that the petition for adjudication was filed on the nineteenth day of April, 1907; that the adjudication of bankruptcy was entered on the thirty-first day of December, 1907, and that on said thirty-first day of December, 1907, the case in bankruptcy was referred to Fremont E. Shurtleff, Esquire referee in bankruptcy, for further proceeding.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Concord, in said district, this thirtieth day of March A. D. 1910.

BURNS P. HODGMAN, *Clerk*.

75 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

No. 896 (Original).

NATHANIEL W. HOBBS, Trustee, Petitioner.

In the Matter of NEW ENGLAND BREEDERS' CLUB, Bankrupt.

Ex Parte: Claim of HEAD & DOWST COMPANY.

Before Colt, Putnam and Lowell, JJ.

Opinion of the Court.

January 3, 1911.

PUTNAM, *J.*:

This case relates to an alleged mechanic's lien under the statutes of New Hampshire on the real estate of the New England Breeders' Club, now in bankruptcy. To avoid all uncertainties the proponent proceeded both by an appeal and also by a petition to revise under the bankruptcy statutes. There were proceedings in the courts of the State of New Hampshire and in the United States District Court for the District of New Hampshire, which we will describe, concluding in the latter court with the following rescript and decree:—

76 *Opinion of the District Court.*

March 19, 1910.

ALDRICH, *J.*:

In view of what appears from the various opinions in the State court in respect to the Head & Dowst Company proceeding, as sup

plemented by arguments and by the facts found by Burns P. Hodgman, master, I am disposed to accept the result reached in the State court as sufficiently establishing the amount and validity of the Head & Dowst Company lien, and therefore decline to independently consider and adjudicate the local lien question further than to accept as conclusive the result reached in the State court.

The trustee having signified a desire to have my decision in this regard reviewed by the Court of Appeals, I wish, so far as I may properly do so, to send that court all questions of discretion. Pending this review the Head & Dowst Company should not move the State court to perfect its lien.

Decree.

March 19, 1910.

At Concord, in said district, on the nineteenth day of March, A. D. 1910, upon the petition of Nathaniel W. Hobbs, trustee in bankruptcy, filed June 10, 1908, that the alleged lien of the Head & Dowst Company be adjudicated in said District Court, and renewed by motion filed March 15, 1910:

Now, therefore, after hearing arguments of counsel, and after due consideration of the same, and of the facts reported to the court by Burns P. Hodgman, master, It is hereby ordered and decreed that said petition of Nathaniel W. Hobbs, trustee, be and hereby is dismissed and denied.

The alleged lien is based upon a written contract between the bankrupt and the Head & Dowst Company, dated August 31, 1905, for the erection of the buildings on the premises in question here. On December 24, 1906, the contract, on which payments were only to be made on certificates of the architect, with the usual reserve, and on which, at the time, a very considerable amount was awaiting an architect's certificate, was put in suit in the Superior Court of the State of New Hampshire, for the purpose of enforcing the lien claim referred to, the bankrupt's realty to which the lien related having been properly attached. At that time the entire amount reserved in the contract had been earned, except a matter of
77 about $1,000 for some shutters. It was determined in the suit in the State court that the sum of $46,748.08 had thus been earned, and was unpaid, and judgment was entered for that amount, as we will state further on. There is no claim, and never was any claim, that the Head & Dowst Company was in any way in default, nor any claim that the proper certificates from the architect were not due it, and would not be given it at the time or times provided for by the contract. Except for the matter of the $1,000 and except also for the absence of the architect's certificate, the whole amount reserved by the contract was due and payable at the time the suit was brought.

Immediately preceding or immediately after the suit the bankrupt became actually and notoriously insolvent, and proceedings in insolvency were had in the courts of the State of New Hampshire, by which, on April 15, 1907, Hobbs, the present trustee, was ap-

pointed assignee under the insolvency laws of the State. The record shows that the suit was tried without a jury by the presiding judge of the Superior Court, and that the assignee in insolvency appeared in defence thereof by his counsel, who were present throughout the entire trial, and who defended the action with care; and that, so far as can be observed, a full, complete and impartial trial was had. There was no substantial variance between the proofs offered in the Superior Court and those afterwards presented in the District Court as shown by the present record. Certain exceptions were reserved; but, subject to those exceptions, judgment was entered for the Head & Dowst Company in the Superior Court on December 18, 1907, awarding the amount we have already stated, with a judgment in rem against the real estate attached.

Meanwhile, on April 29, 1907, a few days more than four months after the lien suit was commenced, an involuntary petition in bankruptcy was filed in the District Court for New Hampshire against the New England Breeders' Club, which was contested several months, so that an adjudication was not entered until December 31, 1907. It appears, therefore, that during the entire period covering the suit in the Superior Court, from the time it
78 originated on December 24, 1906, until the judgment on December 18, 1907, there was no representative of any interests in bankruptcy competent to interpose in the litigation in the State court, and no attempt was made by the District Court to interfere therewith until after the judgment was entered. Hobbs was qualified as trustee on the first day of February, 1908. He delayed until April 14, when he filed a petition in the District Court asking that further proceedings in the New Hampshire courts might be stayed, whereupon, on May 15, 1908, a temporary restraining order was issued as follows:—

Temporary Restraining Order.

May 15, 1908.

Whereas, in the above cause, a motion for the issuance of a permanent restraining order has been filed and it having appeared that there is danger of irreparable injury being caused to the petitioner before the hearing of said application for the permanent restraining order unless said Head & Dowst Company is, pending such hearing, restrained as herein set forth,

Now, therefore, take notice that you, the Head & Dowst Company, defendant herein, your agents, servants, attorneys and counsellors, and each of you, are hereby specially restrained and enjoined from taking further action in the suit of Head & Dowst Company v. New England Breeders' Club, now pending in the Superior Court and the Supreme Court for the State of New Hampshire, to enforce a lien upon the real estate of said New England Breeders' Club, until further order of this court in the premises. I will hear the Head & Dowst Company under special appearance, and without prejudice as to any question of jurisdiction upon reasonable notice to the other side, upon an application to dissolve

this order. It is intended that the party restrained need not necessarily resort to a motion to dissolve, but may at once exercise the right of appeal. In the meantime, and without prejudice to the right of either party, the trustee has leave to co-operate with the Head & Dowst Company with a view of selling the property in dispute, and in case of sale upon joint consent the proceeds will be safeguarded and held until the rights of the parties are established by law.

EDGAR ALDRICH,
U. S. District Judge.

Done at Chambers May 15, 1908.

79 The trustee also filed a petition in the District Court on June 10, 1908, alleging that the claim of the Head & Dowst Company constituted a cloud on the title of the real estate of the bankrupt, praying that the District Court in bankruptcy might adjudicate the validity and amount of its lien if it had any. This petition clearly asked the District Court to take full and independent jurisdiction over the entire topic of the validity and amount of the alleged lien, and it is the alleged refusal of the District Court to do this by its decree of March 19, 1910, which brings the matter to this court in the manner which we have pointed out.

There were other applications to the District Court which we need not refer to except incidentally. There was a reference to a master of August 10, 1909, covering the entire case, which also we need not further state except as hereinafter specially referred to.

When the trustee in bankruptcy was appointed the case was pending on the exceptions in the Supreme Court of the State of New Hampshire. After the trustee was appointed, that is, on January 6, 1910, the District Court entered the following order, having reference to the restraining order issued on May 15, 1908, which we have already set out, namely:

"The injunction is so far modified as to permit the Head & Dowst Company to go before the proper court of New Hampshire, and take necessary steps to have all questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined upon their merits under the New Hampshire law; and the trustee in bankruptcy has leave, and is directed, to make all reasonable effort in the direction of having such questions established by that court. The motion of the trustee that the lien claim be adjudicated by this court is stayed for the present, and will await the result reached in the State court."

Meanwhile the Supreme Court of New Hampshire had made a formal order dismissing the exceptions we have referred to, on the ground that there were no proper responding parties before it, the trustee not having then appeared. But, as we understand the proceedings in that court, as soon as the trustee appeared in accordance with the order of the District Court of January 6, 1910,

80 the Supreme Court restored the case, and heard his counsel.

It is evident from the record that counsel for the trustee did make all the efforts required by the order of January 6, 1910, and

sought a review by the Supreme Court of the entire merits of the case. The Supreme Court found itself unable formally to do further than consider the exceptions. In this, so far as we understand the New Hampshire practice, the Supreme Court was right. It did, however, hold that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the Superior Court.

It is sufficient to say that on the whole we have no reason to doubt that the trial in the Superior Court was properly conducted and full defence made by the assignee in insolvency. Nevertheless, the trustee in bankruptcy urged upon the District Court that the questions of the amount and validity of the lien had never been fully considered or adjudicated by any court authorized so to do; and he urged on the District Court that it should take up these questions de novo. This, as we understand, the District Court by the decree of March 19, 1910, declined to do.

It is true that as to that decree there may be possible claims of interpretations of it in three directions, though to us the third possible interpretation seems, under all the circumstances, to be the correct one. First, it may be claimed that the District Court accepted the conclusions of the State courts as final. Second, it may be claimed that the District Court reviewed the whole case de novo, and intended only to decide that its conclusions on such a review were in harmony with those of the State courts. We do not understand this to be a correct interpretation. Third, it may be that the District Court was of the opinion that, as the proceedings in the State courts affected the disposition of the property of the bankrupt and a determination of the liens existing thereon, the District Court had a right to review it so far as on the face of the record it saw any occasion so to do, in this case placing itself in the substantial position of a court in equity asked to enforce the decree of another court sitting in equity, or of itself sitting in equity at some prior stage of the litigation, where the court so far investigates
81 the proceeding as to satisfy itself that equity will be done in enforcing the prior decree; in other words, that the District Court looked into the proceedings of the State courts so far as to satisfy itself that they were fairly conducted, in accordance with the reasonable and just fundamental rules as to litigated questions, and, finding that they were so conducted, accepted the result as its own. The latter interpretation seems to us to be the reasonable one. Therefore, we will first undertake to ascertain the powres of the District Courts in bankruptcy with reference to litigation pending in a State court.

The counsel have not submitted to us their views on the effect of the appearance of the trustee in the Supreme Court; and therefore, as, if that fact has any effect, it would only be to strengthen the result we have reached, we have not considered it.

We are of the opinion that the State courts, under the circumstances, had the right to proceed to the judgment entered in December, 1907. When the Superior Court assumed jurisdiction, it had undoubted jurisdiction over all the parties interested in the

controversy. It did not lose its jurisdiction because those parties subsequently changed. Although, at the time the judgment was entered in the Superior Court, to which time all subsequent proceedings in the Supreme Court must relate, there was no trustee who in law was authorized to take up the defence, while it may have been within the power of the District Court to restrain further proceedings in the State court until the bankruptcy proceedings had further developed, there was, however, no interference in this direction until after the judgment in the Superior Court, in December, 1907, was entered. Therefore that judgment was valid and effectual, subject perhaps to the right of the District Court afterwards to review the same on account of the powers given it under the Bankruptcy Statutes, if such right did exist.

We have seen that exceptions were reserved for the Supreme Court of the State, and that the trustee, in accordance with the order of January 6, 1910, was secured by the Supreme Court an opportunity to be heard thereon. The Supreme Court did pass upon the exceptions, so that, neither as to the Superior Court nor
82 the Supreme Court, can it be said that the result came from any substantial default.

There can be no question, on the general rules of law and the decisions of the Supreme Court of the United States, that the judgments of the State courts were not void. By this we mean not absolutely void, postponing for the present the question of the power of the court in bankruptcy to examine into them to some extent. The Superior Court having had entire jurisdiction over the parties when the suit was brought, it never lost its jurisdiction in the absence of the fact that the parties did not decease, either by natural death as in the case of individuals, or by dissolution as in the case of corporations. Therefore, that the judgment was not void on account of the pending proceedings in bankruptcy or the result thereof, in view of the dates we have given, has been settled by a continual series of decisions of the Supreme Court, beginning with Ex parte Christy, 3 How. 292, and Peck v. Jenness, 6 How. 612, coming down through a line of cases cited and reaffirmed in Davis v. Friedlander, 104 U. S. 570, Pickens v. Roy, 187 U. S. 177, and other cases which it is not necessary to refer to.

In view of these decisions, it would be impossible to maintain successfully that the result in the District Court appealed against could be questioned, if they represent the ultimate state of the law. Nevertheless this particular case illustrates the necessity of conceding to the courts in bankruptcy a certain revisory power. It was only by the grace of the State Supreme Court that the final judgment was delayed, and a hearing of any kind given the trustee. This is only one illustration of many conceivable cases where a limited revision by a bankruptcy court should justly be permitted. Even, in In re Christy, already referred to, at page 314, Mr. Justice Story, speaking in behalf of the court, said that it was demonstrated that Congress did not intend to limit the jurisdiction of the District Court to the class of cases specifically enumerated in the statute, and that its purpose was to bring within its reach all adverse claims.

Likewise the Circuit Court of Appeals for the Fourth Circuit, in New River Coal Company v. Ruffner, decided on December 1,
83 1908, 165 Fed. Rep. 881, at page 885, shadows out a general rule in the following language, which has reference to the stay of a suit in the State court, instituted prior to the bankruptcy proceedings:—

"It is our opinion that notwithstanding this action of the state court the judge of the District Court, sitting in bankruptcy, had full power upon the application of the bankrupt itself, of creditors, or of the trustee, in case one had been appointed, to take such action as in the discretion of the court was necessary for the preservation of the bankrupt estate, the determination of existing liens, if such there were, and the collection, custody, and distribution of the bankrupt's estate in the manner and to the ends contemplated by the bankruptcy law. In the act forbidding courts of the United States to stay proceedings in a state court, the Courts of Bankruptcy are specifically excepted, and the bankruptcy law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544; U. S. Comp. St. 1901, p. 3418) expressly confers upon these courts the power to issue injunctions to stay proceedings within this exception."

In the same line the Circuit Court of Appeals for the Eighth Circuit, in In re Dana, 167 Fed. Rep. 529, decided on February 23, 1909, in a case where the District Court, acting as a court of bankruptcy, restrained the proceedings in the State court in a suit commenced before the petition in bankruptcy was filed, sustained the jurisdiction. This must have been the view taken by the District Court in the case at bar when it issued its restraining order on May 15, 1908, which we have already described. Without undertaking in all respects to adopt all the phraseology used by Judge Aldrich, we thoroughly commend its general views, and regard them as looking to a result such as we have explained:—

"An examination of the State and Federal cases decided in the periods covered by the various bankruptcy acts discloses a vast field of discussion, and quite a degree of confusion and conflict, as to the respective powers and duties of the two courts; but, after all, it would seem to be safe to assume that there is no hard and fast rule which requires that all litigation pending in the State courts at the time of the adjudication in bankruptcy in respect to the property of the bankrupt estate, shall be left for determination in that forum; neither, as it would seem, is there a hard and fast rule which requires a Federal court to draw unto itself all litigation in respect to a bankrupt estate and as to property in the possession
84 of the bankruptcy trustee. As the Federal bankruptcy law is supposed to be the paramount insolvency law, and as the estate upon adjudication is understood to become an estate in custodia legis, it is quite possible that in the last analysis it might be found (except as to situations within the doctrine of Ester v. Gaff, 91 U. S. 521, and other cases cited in notes § 1582, Remington on Bankruptcy) that the right or power to assume the responsibility of all litigation in respect to the assets of the bankrupt estate resides in the Federal bankruptcy court. Still, if such extreme power exists,

reasonable consideration of comity between the two governments and the two courts, and a reasonable consideration of convenience to suitors, would doubtless, under reasonable judicial discretion, often require that it should not be exercised, and in the great majority of cases would leave local property rights, involved in litigation pending in State courts of general jurisdiction at the time of the adjudication in bankruptcy, to be ascertained and established in the State tribunal as the one most appropriate and best suited to the interests of all parties concerned."

On the other hand, the Supreme Court, in the case covered by our general citation which is most positively expressed, namely, Eyster v. Gaff, 91 U. S. 521, rendered an opinion which, if unqualified, would shut out all jurisdiction of the bankruptcy court in the case at bar. There, however, it said at page 532 that the proceedings in the State court were claimed to be absolutely void. The position taken here, either in the District Court or before us, does not go to that extent. Expressions to the same effect as in Eyster v. Goff, are found in Mueller v. Nugent, 184 U. S. 1, and in Louisville Trust Company v. Cominger, 184 U. S. 18. Expressions apparently otherwise are found in In re Watts, 190 U. S. 1. Perhaps all can be reconciled by what is found on page 32 of the last cited case, as follows:—

"The distinction between the exclusive jurisdiction of the court in bankruptcy, proceeding as it were in rem, to determine the status of a debtor and his assets, and the jurisdiction over property subjected to particular liens, and the like, exercised by courts of concurrent jurisdiction, was probably thought by them not to apply in the circumstances existing here, and advice based on that opinion could not in itself constitute contempt."

Clarke v. Larremore, 188 U. S. 486, which relates to the control taken by the District Court sitting in bankruptcy over moneys
85 in the hands of a sheriff collected on execution out of a State court, is not applicable here, because it is settled law that Federal and other courts having general equitable jurisdiction may control, under some circumstances, moneys collected by a sheriff, or other proceeds of a judgment, without violating any rules applicable as between different courts while the proceedings in litigation are pending.

However, we need not pursue this topic further, as we are able to affirm the final conclusion of the District Court in any view to be taken of the relations between that court and the local tribunals. As the Superior Court had original jurisdiction, which was at least not so far divested that any judgment it rendered was absolutely void, and as it was careful at the crucial stage of the proceedings to have before it parties who could, at least informally, represent adverse interests, parties who, in a broad sense are the same as those now before us, it cannot be fairly claimed that it proceeded against common right, or in violation of any of the fundamental rules of the law. It had sufficient before it to enable it to dispose understandingly of the questions involved. It is certain, therefore, that in no view would we be justified in reviewing its proceedings or

determinations with regard to minor matters, like questions of minor amounts involved, or questions whether certain minor portions of the property were or were not parts of the parcel to which the lien attached, all of which are now brought before us by the trustee. There would be no end to litigation if courts in bankruptcy should undertake to revise the proceedings of the State courts in such matters of detail, and no value to the judgments of those courts if the Federal courts had jurisdiction to do so, and assumed to exercise it. We, moreover, do not hesitate to declare on the main question presented to us, which was also presented to the State tribunals, that the Head & Dowst Company was substantially entitled to the judgment for the lien claim which it received.

The trustee has with great diligence and much ability cited to us authorities to the effect that the contract for the construction of the buildings on the premises of the bankrupt was never completed, so that the remedy of the Head & Dowst Company was
86 merely on a quantum meruit, for which under the local decisions it is maintained a lien does not lie. None of them require examination by us, because they are all met by Roehm v. Horst, 178 U. S., 1, wherein it is held that, after the renunciation of a continuing agreement by one party, the other is at liberty to consider himself absolved from any future performance, and secures a right to recover for all consequences of the breach of it, and that, under such circumstances, the suit is on the contract itself, and not at all on a quantum meruit. We have given so much of the substance of this decision as is necessary to establish our propositions, although independently of it, under the proper understanding of the law as it existed prior to the announcement of Roehm v. Horst, we should apply here the same rule, and hold that, under the circumstances, the Head & Dowst Company had entitled itself to proceed on the contract for the entire amount of the work done by it, and consequently, notwithstanding the decisions cited by the trustee, to maintain its statutory lien for whatever remained unpaid.

Roehm v. Horst was affirmed in The Eliza Lines, 198 U. S. 119, 129, though probably it is unnecessary to state this. The application here of the rule announced therein is very simple. Miller, the president of the bankrupt corporation, was for the purposes of this case practically the corporation. He executed the contract sued on, and his authority to execute it was never questioned. The directors met only at infrequent intervals, and the management of the ordinary affairs of the corporation was left in the hands of the president, who, as the case shows, "really had actual charge of the Club's business." The record also adds that he was "the man with whom the Head & Dowst Company did its business, and carried on its correspondence." Miller's own testimony was to the effect that his assumption to exercise all the powers of the bankrupt corporation was never objected to. Taking the record as a whole, it is apparent that the entire subject-matter of the work contracted for by the Head & Dowst Company had by acquiescence
87 come under his sole charge. On September 26 and December 14, 1906, the following correspondence between him and the Head & Dowst Company occurred:

SEPTEMBER 26, 1906.

Messrs. Head & Dowst Co., Manchester, N. H.

GENTLEMEN: I have talked with our principal stockholders about paying you in cash as per your request of the twenty-third and twenty-fifth inst., but my efforts have been unavailing. I am afraid that we can do nothing except send you notes in any convenient amounts you may suggest for the amount that Mr. Rice will include in your certificate. I am awfully sorry but I do not see any way of arranging payment.

Yours very truly,

ANDREW MILLER, *President.*

DECEMBER 14, 1906.

Messrs. Head & Dowst, Manchester, N. H.

GENTLEMEN: I beg to advise you that the New England Breeders' Club will not be able to meet the note given you for $28,000, due December 18, 1906, and most respectfully request that you allow us to renew the same under the same terms for a period of four months frm December 18th, 1906.

We will be pleased to send you a note at four months in settlement of the balance due you.

Kindly communicate with the New England Breeders' Club at once.

Yours truly, ANDREW MILLER, *President.*

On December 19, 1906, Miller sent the following telegram to the Head & Dowst Company:—

NEW YORK, *Dec.* 19.

To Head & Dowst Co., Manchester, N. H.:

Owing to inability to secure the consent of a majority of the creditors of the New England Breeders' Club we will not renew the note given you as per letter written you, the New England Breeders' Club has no funds to meet the note given you.

ANDREW MILLER.

88 The record shows that there was no question that at this time the New England Breeders' Club was hopelessly insolvent; and on December 29, 1906, its president, Miller, told the attorney of this Head & Dowst Company, who had been sent to him by the Head & Dowst Company regarding its claims, that the former corporation had no funds, that its stockholders had refused to pay in any more money, that the directors would not personally endorse the obligations to the Head & Dowst Company, that they would pay nothing, that the Head & Dowst Company must look to its lien to support its claim, and that this is what he meant by his telegram above quoted. Therefore, there can be no doubt that both the State court and the District Court held, and that also we on appeal, should hold, that the New England Breeders' Club had abandoned the contract with the Head & Dowst Company; so that the case is fully and

clearly within Roehm v. Horst. The consequence is that in any event the Head & Dowst Company was entitled to proceed to enforce its lien for the balance due it, — and that in any view the adjudication of the State courts with reference to this, which is the substantial question in the case, cannot be disturbed.

In No. 873, Hobbs, Trustee, Appellant v. Head & Dowst Company, Appellee, the judgment is:

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal, so far as they can be paid out of the estate in bankruptcy.

In No. 896, Hobbs, Trustee, Petitioner, the judgment is:

The petition is dismissed, and the respondent recovers its costs, so far as they can be paid out of the estate in bankruptcy.

89 & 90 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Final Decree.

January 3, 1911.

This case came on to be heard October 4 and 5, 1910, upon the transcript of record of the District Court of the United States for the District of New Hampshire and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 3, 1911, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, and the appellee recovers its costs of appeal, so far as they can be paid out of the estate in bankruptcy.

By the Court:

FRANCIS M. FOGARTY, *Clerk.*

91 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

No. 896, (Original).

NATHANIEL W. HOBBS, Trustee, Petitioner.

In the Matter of NEW ENGLAND BREEDERS' CLUB, Bankrupt.

Ex Parte Claim of HEAD & DOWST COMPANY.

Petition for Rehearing by the Appellant and Petitioner Herein.

Having carefully examined the opinion of the Honorable Court, filed January 3, 1911, we respectfully pray for a rehearing on the following grounds:

1. Because the Honorable Court has fallen into a grievous error which may be readily pointed out and corrected if further opportunity for argument be granted.

2. Said error consists in applying to the case at bar a legal proposition, undoubtedly sound, but with no decisive or important bearing upon the present controversy.

3. Said error proceeds from an attempt to apply to a partially completed building contract the rule enounced concerning a contract for the future delivery of personal property, in Roehm v. Horst, 178 U. S. 1.

4. Roehm v. Horst, supra, declares a familiar rule embracing the following propositions:

a. After the renunciation by one party of a continuing agreement to deliver personal property, the other party is excused from
92 further performance, or tender of performance, and may at once bring suit for breach of contract.

b. The measure of damages is the difference between the contract price and the market price.

5. It is plain that this rule could apply to a building contract only in case no work had been done under it. There would then be a right of action for breach of contract, and the measure of damages would be the difference between the contract price and the market price, i. e., what it would cost to construct the building at going prices.

It should be equally plain that where the building has been partially completed, an action for the breach to recover the unearned profits, would not be enough; the principal ground of recovery would be compensation for the portion already constructed, including what it actually cost at going prices, as well as the profit on that portion.

All authorities agree that in case of an uncompleted contract for an entire price, the action is on a quantum meruit, and the measure of damages, where most of the work has been done, is the contract price, less what it would cost to complete the work (69 N. H. 466, 468, 469).

The rule is laid down as follows in Clark on Contracts, section 255:

"Where a contract is broken by one of the parties, the other party acquires, or may acquire, three distinct rights:

"(*a*) He may be discharged from further performance.

"(*b*) If he has done anything under the contract, he has a right to sue on the quantum meruit, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law.

"(*c*) He has a right of action on the original contract, or term of the contract broken, and may maintain:

"(1) A suit to obtain damages for the loss sustained by the breach.

93 "(2) A suit to obtain specific performance of the contract by the other party."

Clark on Contracts, section 255.

(Note that the right to recover for what has been done under the contract, is a cause of action distinct from that arising out of the original contract.)

The entire ground of recovery in the suit at bar was for what had been done under the contract; hence the entire cause of action arose from an implied contract; none of it was grounded on the contract itself, or any breach of that contract.

6. It is plain that Roehm v. Horst, 178 U. S. 1, supra, is no authority for any one of the following propositions:

a. The inability of the owner to pay the contract price is a sufficient excuse for the contractor to abandon work on the owner's building; or

b. Failure or refusal to make payments is a sufficient excuse for such abandonment; or

c. Such inability, failure, or refusal, advances the time when payments are due under such contract; or

d. Such inability, failure, or refusal, gives a present right of action when nothing is due or payable under such contract; or

e. A lien suit may be maintained under a contract when nothing is payable under its terms; or

f. A party to a building contract may in any case enforce his mechanics' lien for labor and materials, whether he completes his contract or not; or

g. A party to a building contract may in any case recover any payment under such contract whether he has fully performed every condition precedent to such payment, or not.

7. To entitle the plaintiff in this case to maintain his mechanics' lien suit, authority must be found for the foregoing propositions. Roehm v. Horst, supra, is authority for none of them; hence the opinion which is based on Roehm v. Horst, is unsound.

94 8. We confidently assert that a building contractor, who for any reason fails to perform an entire contract, has no remedy for the work already completed except upon his quantum meruit for the fair value of his work and materials; his only action for breach of the contract is for the profits on that part of the work which he has been prevented from completing.

9. A further consideration of the authorities cited by us should convince any court that the plaintiff has no right to maintain its suit for a mechanics' lien in the present case. All the authorities are cited in our briefs, and they are all our way.

10. It is stated in the opinion (p. 3) that "there is no claim, and never was any claim, that the Head & Dowst Company was in any way in default, nor any claim that the proper certificates from the architect were not due it, and would not be given it at the time or times provided for by the contract;" while in fact it has always been claimed by your petitioner that the Head & Dowst Company was in default, and that no architect's certificate has been or is now due for any part of the sum sought to be recovered in this action.

Supp. Brief for App't, pp. 27-30.

11. It is stated in the opinion (p. 3) that the involuntary petition in bankruptcy was filed "April 29, 1907, a few days more than four months after the lien suit was commenced," while in fact said petition was filed on the 19th day of April, 1907, a few days less than four months after the lien suit was commenced (Record, p. 40). This date has a most important bearing on the question of preference.

12. No law court of competent jurisdiction has passed upon the legal merits of the alleged lien. Through a blunder of counsel for the Assignee in Insolvency no primary exceptions were saved (Record, p. 52), and the Supreme Court of New Hampshire refused to go into the actual merits of the case (p. 64).

In the opinion of this Honorable Court (p. 6), it is stated that the Supreme Court of New Hampshire did "hold that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the Superior Court" (pp. 63, 64). This was a mere legal assumption based upon the finding of a general
95 verdict (p. 63), and was an assumption contrary to the fact (p. 52).

13. In the opinion (p. 8) it is assumed that the judgment in the Superior Court was not void because the attachment was more than four months before the beginning of the bankruptcy proceedings. As we have already seen (Sec. 11) this assumption is erroneous, the attachment having been made December 24, 1906, and the petition in bankruptcy having been filed April 19, 1907, well within four months (Record, pp. 39, 40).

14. In the opinion (p. 11) it is stated that the main question presented here is the one which was presented to the State tribunals, while in fact the main question which we ask the court to pass on here, i. e., the validity of the alleged mechanics' lien, has never been passed upon by the New Hampshire Supreme Court upon its merits (Record, pp. 52, 63, 64).

15. In the opinion (p. 3) it is stated that "Except for the matter of the $1,000 and except, also, for the absence of the architect's certificate, the whole amount reserved by the contract was due and payable at the time the suit was brought," while in law and in fact nothing was due and payable when the suit was brought (Supp. Brief for App't, pp. 26-28).

We desire to remind the Honorable Court that little time was afforded counsel to argue these various and important phases of the case, for the reason that it was not anticipated that the validity of the alleged lien would be considered upon this record. Neither upon oral argument nor in the briefs, has the question which the Honorable Court finds controlling, been argued.

Wherefore, upon the foregoing grounds, this appellant and petitioner respectfully prays this Honorable Court to grant to him a rehearing of said cause.

HENRY F. HOLLIS,
Attorney for Appellant and Petitioner.

96 I, Henry F. Hollis, counsel for the appellant and petitioner, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

HENRY F. HOLLIS.

97 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
vs.
HEAD & DOWST COMPANY, Appellee.

No. 896 (Original).

NATHANIEL W. HOBBS, Trustee, Petitioner.

In the Matter of New England Breeders' Club, Bankrupt.

Ex Parte Claim of Head & Dowst Company.

Petition for Rehearing.

Before Colt, Putnam and Lowell, JJ.

Rescript and Order of Court.

March 1, 1911.

PUTNAM, *J.*:

These are the cases in which judgments for the Head & Dowst Company were entered on January 3, 1911. This petition is entitled

both in Hobbs, Trustee, v. Head & Dowst Company, and in Nathaniel W. Hobbs, Trustee, Petitioner. It is not necessary to notice the latter proceeding, because it was plainly dismissed for want of jurisdiction. The merits were disposed of in Hobbs, Trustee, Appellant, v. Head & Dowst Company, Appellee, and the Head & Dowst Company has now filed this petition for a rehearing.

98 The petition for a rehearing takes notice of the fact that the involuntary petition in bankruptcy involved here was filed on April 19, 1907, instead of April 29, 1907, as stated in our opinion, and, therefore, in fact, a few days within the four months after the lien suit referred to in these proceedings was commenced. This is wholly an unimportant matter, because no question of preference arises here.

The petition for a rehearing treats Roehm v. Horst, 178 U. S. 1, as though it were purely a superficial case relating entirely to the detailed circumstances out of which it grew. This is an absolute misapprehension, for Roehm v. Horst goes to the very bottom of a fundamental rule to such an extent that, as we said in our opinion, independently of it the rule which was reaffirmed by it would apply here. This rule is so fundamental as to dispose of the merits of these proceedings in any possible view that can be taken of them, or of what occurred in the courts of New Hampshire; and this in such a way that it is unnecessary to notice any other propositions now brought to our attention.

We have given full consideration to the petition for a rehearing, and the following order must be entered:

Ordered: With reference to the petition for a rehearing filed by Nathaniel W. Hobbs, Trustee, Appellant, on February 3, 1911, it appears that no judge who concurred in the judgments desires that the petition be allowed; and the same is dismissed, and mandate will issue forthwith.

99 & 100 United States Circuit Court of Appeals for the First Circuit.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Order of Court.

March 1, 1911.

Ordered: With reference to the petition for a rehearing filed by Nathaniel W. Hobbs, Trustee, Appellant, it appears that no judge who concurred in the judgment desires that the petition be allowed; and the same is dismissed, and mandate will issue forthwith.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

On March 17, 1911, mandate issued; on September 13, 1911, appellant filed a petition for recall of mandate; and on September 25, 1911, mandate was recalled and cancelled.

101 & 102 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Appellant's Petition for Recall of Mandate.

To the Honorable United States Circuit Court of Appeals for the First Circuit:

Nathaniel W. Hobbs, of Concord, in the District of New Hampshire, as he is Trustee in Bankruptcy of the New England Breeders' Club, brings this, his petition, and shows to this Honorable Court as follows:

That on the twenty-ninth day of March, 1910, an appeal was duly taken to this Honorable Court by your petitioner from a decree entered by the District Court of the United States for the District of New Hampshire on the nineteenth day of March, 1910, in the cause, Nathaniel W. Hobbs, Trustee, Appellant v. Head & Dowst Company, Appellee, in the matter of New England Breeders' Club, Bankrupt, Ex Parte Claim of Head & Dowst Company; that this Honorable Court affirmed said decree of said District Court on the third day of January, 1911; that your petitioner herein seasonably petitioned this Honorable Court for a rehearing in said cause, which petition was denied on the first day of March, 1911, and that in the rescript denying said petition was included an order that the mandate issue forthwith; that said mandate issued accordingly and was received and filed in said District Court on the twenty-fourth day of March, 1911.

103 & 104 Your petitioner further shows that through his counsel and before said mandate issued, he notified said Head & Dowst Company that an appeal would be taken to the Supreme Court of the United States from the decree entered in this Honorable Court on the third day of January, 1911; that he duly filed his petition for allowance of said appeal from said decree on the twenty-third day of March, 1911; that your petitioner is informed and believes that no hearing can be had on said petition for appeal to the United States Supreme Court after the end of the term during which said petition was filed unless said mandate be first recalled; and your petitioner is further informed and believes that said mandate cannot be recalled after the expiration of the term during which said mandate issued;

Your petitioner further shows that no harm can result to any of the parties by the recall of said mandate; and that he is informed and believes that unless said mandate is recalled it may hinder and

embarass the proceedings for appeal from this Honorable Court to the Supreme Court of the United States;

Wherefore your petitioner prays that said mandate in said cause, issued by order of this Honorable Court, be recalled until after said petition for appeal to said United States Supreme Court shall be considered and passed on by this Honorable Court.

NATHANIEL W. HOBBS, *Trustee.*

105 & 106 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Order of Court.

September 25, 1911.

It is ordered that the mandate herein issued March 17, 1911, be and the same hereby is recalled and cancelled.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

107 & 108 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Appellant's Petition for Appeal to the Supreme Court of the United States.

(Filed in Circuit Court of Appeals October 3, 1911.)

The above-mentioned appellant, Nathaniel W. Hobbs, respectfully shows that he is aggrieved by the opinion, judgment and decree entered in the above-entitled cause in the United States Circuit Court of Appeals for the First Circuit on the third day of January, 1911, affirming the decree of the District Court of the United States for the District of New Hampshire, and by the rescript, order and decree entered in said cause in said Court on the first day of March, 1911, denying said appellant's petition for rehearing duly filed herein; and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that said judgment and decree

and said order and decree are final, and it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellant prays that an appeal be allowed him in the above-entitled cause directing the clerk of the United States Circuit Court of Appeals for the First Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

HENRY F. HOLLIS,
Attorney for Appellant.

109 & 110 United States Circuit Court of Appeals for the First Circuit, October Term, 1910.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Affidavit as to Amount in Controversy.

(Filed in Circuit Court of Appeals October 3, 1911.)

STATE OF NEW HAMPSHIRE,
Merrimack County, ss:

Henry F. Hollis of Concord in said county, being duly sworn, on his oath says that he is personally acquainted with the subject matter of the above-entitled suit and is fully informed as to the details and value of the property involved; that said suit involves all the real estate of the bankrupt estate of the New England Breeders' Club, Bankrupt; that said real estate was purchased in the year 1905 for a sum in cash exceeding $50,000, and buildings have since been erected on the same at an expense of over $200,000., and that the present market value of the same is, in his opinion, a sum exceeding $50,000; and that the title to all of said property is in controversy in this suit, and the amount so in controversy exceeds the sum of $5,000, exclusive of interest and costs.

HENRY F. HOLLIS.

Subscribed and sworn to, before me, this 22nd day of March, 1911.

[SEAL.] ROBERT C. MURCHIE,
Notary Public.

111 & 112 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,

v.

HEAD & DOWST COMPANY, Appellee.

Assignment of Errors on Appeal to the Supreme Court of the United States.

(Filed in Circuit Court of Appeals October ?, 1911.)

The appellant in the above-entitled cause, in connection with his petition for appeal herein, presents and files therewith his assignment of errors, and says that the United States Circuit Court of Appeals for the First Circuit erred in this way, to wit:

First. In affirming the decree of the United States District Court for the District of New Hampshire.

Second. In failing to adjudicate that the alleged mechanics' lien claimed by said appellee upon the real estate in the possession of said appellant as a Trustee in Bankruptcy, was invalid.

Third. In holding upon the record presented that said appellee was entitled to proceed in the State Courts to enforce said alleged mechanics' lien against the real estate in the possession of said appellant as a Trustee in Bankruptcy.

Fourth. In failing to adjudicate that a permanent injunction should issue against said appellee to prevent the enforcement of said alleged mechanics' lien in the Courts of the State of New Hampshire.

Fifth. In holding that the adjudication as to said alleged mechanics' lien in said State Courts, could not be disturbed.

Sixth. In holding upon the record presented that said appellee was entitled to proceed on the contract for the entire amount of work done by it, and to maintain its statutory lien for whatever remained unpaid.

Seventh. In failing to remand said cause to said District Court for an adjudication of said alleged mechanics' lien upon its merits.

Eighth. In attempting to pass upon the merits of said alleged mechanics' lien, upon the record presented.

113 & 114 Ninth. In failing to hold that said District Court and said Circuit Court of Appeals have authority to determine upon their merits the validity and amount of mechanics' liens claimed upon the real estate in the possession of a Trustee in Bankruptcy.

Tenth. In accepting the results reached in the State Courts of New Hampshire as in any way affecting or binding said United States Courts.

Eleventh. In attempting to apply to the case at bar, involving a partially completed building contract, the rule enounced concerning a contract for the future delivery of personal property in Roehm v. Horst, 178 U. S. 1.

Twelfth. In holding that there is no claim that said appellee was in any way in default, nor any claim that the proper certificates

from the architect would not be given at the proper time or times provided in the contract.

Thirteenth. In holding that the involuntary petition in bankruptcy was filed more than four months after the lien suit was commenced.

Fourteenth. In holding that the trial in the State Courts was properly conducted and a full defence made by the assignee in insolvency.

Fifteenth. In holding that the Supreme Court of New Hampshire held that all the facts essential to the creation and preservation of the lien had been found for the appellee in the New Hampshire Superior Court.

Sixteenth. In holding that the amount and validity of the appellee's alleged lien has been passed upon by the State Courts upon its merits.

Seventeenth. In holding that, except for the matter of One Thousand Dollars for shutters, and also for the absence of the architect's certificates, the whole amount reserved by the contract was due and payable at the time the lien suit was brought.

Eighteenth. In holding that, neither as to the State Superior Court, nor the State Supreme Court, can it be said that the result came from any substantial default.

Nineteenth. In holding that a full, complete and impartial trial was had in the State Courts.

Twentieth. In holding that said appellee was substantially entitled to the judgment for the lien claim which it obtained in the State Court.

Wherefore said appellant prays that said judgment, order and decrees may be reversed in all things.

HENRY F. HOLLIS,
Attorney for Appellant.

115 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Appeal from the District Court of the United States for the District of New Hampshire.

Petition for Appeal to Supreme Court.

Before Colt and Putnam, JJ.

Opinion of the Court.

November 24, 1911.

PUTNAM, *J.*

This is in the same case in which we passed down an opinion on the third day of January, 1911, reported in 184 Fed. Rep. 409, and

is a petition for allowance of an appeal to the Supreme Court from our decree affirming the proceedings of the District Court. The case relates to establishing a lien on real estate, and involves a question which might arise independently of any proceedings in bankruptcy. Therefore, as it involves the requisite amount, and does not depend upon the citizenship of the parties, it is appealable from the Circuit Court of Appeals in accordance with the sixth section of the act of March 3, 1891, constituting those courts. There have been many discussions by the Supreme Court of this question, but the
116 whole comes down to the proposition that the jurisdiction of the Court of Appeals over the District Court by formal appeal exists wherever the controversy is of such a character that it might arise where there were no bankruptcy proceedings whatever. All such controversies bring the right of appeal within the provision of the sixth section of the act of 1891 which we have cited. It is not necessary to cite any decisions on this point except Burleigh v. Foreman, decided by us on September 22, 1903, 125 Fed. Rep., 217, and in addition, in the Supreme Court, Hewitt v. Berlin Machine Works, 194 U. S. 296, 310, approving Burleigh v. Foreman, and Coder v. Arts, 213 U. S. 223, 233 and sequence.

But it is claimed that the proceeding in the Court of Appeals was of a revisory nature. It is sufficient to say that there was a formal appeal and also a petition for revision, and that the petition for revision was dismissed, while the judgment was on the appeal. Whatever may be said with reference to the reasons for the judgment, it is as a matter of law conclusive on the merits; and, notwithstanding any suggestions in the opinion to the contrary, if there are any, the decree in fact disposed of the merits, even if it might be doubtful on what precise grounds the District Court proceeded. The petition for revision became immaterial, and therefore, as a matter of law arising on the face of the judgment, the case was determined on the formal appeal; and, as the case involved a controversy which existed independently of any bankruptcy proceedings, as we have shown, this proposition against our allowing an appeal to the Supreme Court is ineffectual.

It is said, however, that the appeal was not asked for in season. It is true it was not asked for until after the expiration of thirty days from the entry of judgment, and to a certain extent the Bankruptcy Statutes require appeals to the Supreme Court to be taken within thirty days. We need not recite the statutory provisions, because they are to be found at length in Conboy v. Bank, 203 U. S. 141, 143, 144. The objection to an allowance of an appeal on account of this limitation cites Conboy v. Bank, and Coder v. Arts, 213 U. S. 223, but the statute limiting an appeal period to thirty
117 days relates by its terms only to appeals taken expressly under the Bankruptcy Statutes. This is the construction given to the statutes by Rule XXXVI of the General Orders and Forms in Bankruptcy; and in the same way that Rule requires the filing of specific findings of fact and conclusions of law only in relation to the same class of appeals. Conboy v. Bank related expressly to a formal proof of a claim in bankruptcy, while Coder v. Arts related

to proceedings of a mixed character, which, on the whole, the court concluded were governed by the fact that they involved a like formal presentation of a claim, following in this respect the substance of the initial case of Hutchinson v. Otis, 190 U. S. 552. Consequently, there is nothing standing in the way of the allowance of the appeal now asked for.

Appeal allowed.

118 & 119 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Order of Court.

December 5, 1911.

It is ordered that citation on appeal to the Supreme Court signed by the Senior Circuit Judge issue, and no bond is required of the trustee, appellant.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

120 & 121 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Head & Dowst Company, a corporation duly established by law and doing business in Manchester, in the District of New Hampshire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the* twenty-ninth day of December next, pursuant to an Appeal duly obtained from a decree of the† United States Circuit Court of Appeals for the First Circuit wherein Nathaniel W. Hobbs, Trustee, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Senior Circuit Judge, and a Judge of the United States Circuit Court of Appeals for the First Circuit this fifth day of December, in the year of our Lord one thousand nine hundred and eleven.

LE BARON B. COLT,
Senior Circuit Judge.

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* Not exceeding 30 days from the day of signing.
† Name of Court in which the Decree is entered.

122 UNITED STATES OF AMERICA,
District of New Hampshire, ss:

MANCHESTER, N. H., *December* 7, 1911.

I hereby acknowledge service of the within citation.

GEO. H. WARREN,
Manchester, N. H., Attorney for Head & Dowst Company, Appearing Specially.

123 United States Circuit Court of Appeals for the First Circuit
October Term, 1911.

No. 873.

NATHANIEL W. HOBBS, Trustee, Appellant,
v.
HEAD & DOWST COMPANY, Appellee.

Clerk's Certificate.

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals of the cause entitled, No. 873, Nathaniel W. Hobbs, Trustee, Appellant, v. Head & Dowst Company, Appellee, in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, also the original Citation issued upon the appeal of Nathaniel W. Hobbs, Trustee, Appellant, in said cause with acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit the eighth day of December, A. D. 1911.

[Seal United States Circuit Court of Appeals,
First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

Endorsed on cover: File No. 22,980. U. S. Circuit Court Appeals, 1st Circuit. Term No. 148. Nathaniel W. Hobbs, trustee, appellant, vs. Head & Dowst Company. Filed December 26th, 1911. File No. 22,980.

Office Supreme Court, U. S.
FILED
DEC 11 1913
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 148.

NATHANIEL W. HOBBS, *Trustee, Appellant,*

vs.

HEAD & DOWST COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR APPELLANT.

HENRY F. HOLLIS,
Of Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Tunis v. Asso.,	98 Cal., 285	40
Underhill v. North Am. Co.,	31 How. Prac. (N. Y.), 34	26
Van Clief v. Van Vechten,	130 N. Y., 571	35
Vandegrift v. Cowles Eng. Co.,	161 N. Y., 435	25
Van Stone v. Company,	142 U. S., 128	15
Wade v. Haycock,	25 Pa. St., 382	35
Wadleigh v. Sutton,	6 N. H., 15	32, 43
Wason v. Martel,	68 N. H., 560	14
Weeks v. O'Brien,	59 N. Y., Super. Ct., 28	35
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West v. Bechtel,	125 Mich., 144	20
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lien, which is claimed by the appellee upon real estate in the hands of the appellant, a trustee in bankruptcy.

The bankrupt is the New England Breeders' Club.

The property at stake is real estate situate at Salem, New Hampshire.

The appellee is the Head & Dowst Company of Manchester, New Hampshire.

The main question is whether the property of the New England Breeders' Club shall be divided ratably among the creditors of the club, or shall be turned over to the Head & Dowst Company, to the exclusion of the general creditors.

In the fall of 1906 the New England Breeders' Club (hereinafter called *the Club*) was hopelessly insolvent (Record, p. 30).

On Dec. 24, 1906, the Head & Dowst Company (hereinafter called *the Dowst Co.*) brought suit against the Club, under the New Hampshire Statutes (N. H. Pub. Stats., c. 141, ss. 10, 16, 17), to secure and enforce its claim for a lien for labor performed and materials furnished, the action being returnable in the Superior Court for the county of Hillsborough at the May Term, 1907; and on said Dec. 24, 1906, all the real estate of the Club in Salem, N. H., was attached for the purpose of securing and enforcing said lien claim (p. 32).

On April 15, 1907, the Club had been decreed insolvent by the Probate Court of Rockingham County, N. H., and N. W. Hobbs was appointed assignee in insolvency under the State statute (p. 32).

The Dowst Co. entered its suit at the May Term, 1907, of the Superior Court, and Eastman, Scammon & Gardner entered their appearance in that court for N. W. Hobbs, the assignee (p. 32).

An involuntary petition in bankruptcy was filed in the

United States District Court on April 19, 1907 (p. 32), within four months of the attachment made by the Dowst Co. (Dec. 24, 1906).

The lien suit of the Dowst Co., was tried in the State Court by Honorable R. J. Peaslee, presiding justice, without a jury, on Dec. 6, 1907 (p. 33). Before the trial was commenced, counsel for the assignee in insolvency informed Judge Peaslee orally that a petition in bankruptcy against the Club was pending in the United States District Court; but the presiding justice proceeded with the trial, and at the conclusion of the trial ordered judgment *in rem* against all the real estate of the Club in the sum of $46,748.08 (p. 33).

Subsequently, on December 31, 1907, the Club was adjudicated a bankrupt in the United States District Court on the petition of April 19, 1907, and N. W. Hobbs, then acting as assignee in insolvency, was appointed trustee in bankruptcy, and qualified as such on Feb. 8, 1908. On Feb. 10, 1908, Mr. Hobbs, the assignee, turned over to himself, as trustee, all property of the Club then in his possession (p. 32).

As a consequence of certain exceptions taken by the assignee in insolvency at the trial before Judge Peaslee, a case was drawn in accordance with the practice of the State Courts, and the action was transferred to the New Hampshire Supreme Court (the law court) on Feb. 3, 1908. Henry F. Hollis and Eastman, Scammon & Gardner appeared for the assignee in insolvency and they filed a brief in his behalf on April 7, 1908 (p. 33).

When the case came on for argument in the New Hampshire Supreme Court, counsel filing the brief stated that the defendants did not appear and that the assignee in insolvency had surrendered the property to a trustee appointed in proceedings in bankruptcy in the Federal Court

and had been discharged as assignee. In this situation the New Hampshire Supreme Court declined to consider the exceptions until the bankruptcy proceeding should be dismissed or the trustee in bankruptcy be made a party. The Dowst Co. then obtained and served upon the trustee in bankruptcy an order notifying him of the pendency of the proceedings, but the trustee declined to appear, and the exceptions were overruled without consideration (pp. 34, 35).

On May 15, 1908, the trustee in bankruptcy obtained a temporary order from the United States District Court restraining the Dowst Co., its agents, etc., from taking any further action in the State Courts. This temporary restraining order has never been dissolved (pp. 37, 38).

On June 10, 1908, the trustee filed the petition upon which the decree under consideration is based, asking that the alleged lien be adjudicated in the Federal Court (p. 38). On April 29, 1909, this petition of the trustee and the Dowst Company's motion to dissolve the restraining order came on for hearing in the United States District Court, and Burns P. Hodgman was appointed Master to find and report the facts (p. 41).

The Master filed his report on Dec. 6, 1909 (p. 12), reporting the foregoing facts and stating that "in the original suit in the Superior Court counsel for the assignee failed to move at the conclusion of the evidence for a nonsuit or for a directed verdict, so that the primary exceptions of the assignee, which relate to the verdict found on the evidence and the judgment ordered in accordance therewith, are apparently worthless under recent decisions of the New Hampshire Supreme Court" (p. 43).

On Jan. 6, 1910, Judge Aldrich of the United States District Court, after a hearing on the trustee's petition to have the Dowst Co. lien adjudicated in the District

Court, "contrary to impressions tentatively expressed at the oral arguments," reached the conclusion that he "ought to deny the application at this stage of the proceedings, to adjudicate here the *Head & Dowst* claim, and decline to continue the injunction in its present form" (p. 46).

The opinion concluded with the following:

> "Let the order be: The injunction is so far modified as to permit the *Head & Dowst Company* to go before the proper court of New Hampshire, and take necessary steps to have all questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined *upon their merits* under the New Hampshire law; and the trustee in bankruptcy has leave, and is directed, to make all reasonable effort in the direction of having such questions established by that court. The motion of the trustee that the lien claim be adjudicated by this court is stayed for the present, and will await the result reached in the State Court" (p. 50).

Counsel for the Trustee thereupon appeared before the Supreme Court of New Hampshire on Feb. 1, 1910, and moved that the order "exceptions overruled" be stricken off (p. 56). He further stated that, in his opinion, the reserved case as sent up by Judge Peaslee did not contain sufficient findings of facts, or rulings of law, to enable the New Hampshire Supreme Court to decide the questions involved *upon their merits;* that it was claimed by plaintiff's counsel that the defendant's counsel failed to make the proper motions and take the necessary exceptions to raise the real legal questions for the decision of the New Hampshire Supreme Court; that Judge Peaslee had transferred all the evidence, stating that upon the evidence he had found for the plaintiffs and ordered a judgment *in rem* against the property, and that the defendants excepted to the ver-

dict and to the judgment *in rem*. He further moved that the case be recommitted to the New Hampshire Superior Court for findings of fact and rulings of law, which would present to the New Hampshire Supreme Court the legal questions involved. Counsel for the Dowst Co. refused to assent to such recommittal (pp. 56, 57).

The New Hampshire Supreme Court on Feb. 8, 1909, permitted counsel to argue the questions raised by the reserved case and the motion to recommit (p. 57).

On March 1, 1910, the New Hampshire Supreme Court rendered an opinion upon the original reserved case, to the effect that the defendants had failed to make the proper motions to raise the legal questions involved in the lien controversy, so that they "take nothing by this exception" (p. 52), and that "*the questions which the defendants seek to raise relating to the validity of the lien are eliminated*" (p. 52).

This decision was called to the attention of the United States District Court by the trustee by motion on March 15, 1910 (pp. 50, 51), and on March 19, 1910, the Honorable District Court delivered an opinion to the effect that the result reached by the State court was accepted as conclusive upon the amount and validity of the *Head & Dowst Company* lien, and entered a decree dismissing the petition of the Trustee that the lien be adjudicated in the United States District Court (p. 58).

The result is that through the omission of counsel, who did not represent the bankrupt estate in the New Hampshire Superior Court, the questions of law upon which the validity of the Dowst Co. lien depends, have never been considered in any court of last resort. A single judge, sitting at *nisi prius*, rendered a verdict against the Club, and ordered a judgment *in rem* against property which was even then, in the theory of the law, in the custody of the Federal Court.

Specification of Errors.

The Assignment of Errors is printed on pages 80 and 81 of the Record. It follows, in arrangement, the opinion delivered in the Honorable Circuit Court of Appeals. The various errors assigned fall naturally into four groups:

1. The main question,—validity of mechanics' lien.

2. The jurisdictional question,—binding effect of proceedings in State courts.

3. The general equities,—the extent to which the real merits have been adjudicated.

4. The technical question,—form of the decree.

Rearranging the errors assigned, we present the following

Specification of Errors.

The United States Circuit Court of Appeals for the First Circuit erred:

(Validity of Lien.)

First. In failing to adjudicate that the alleged mechanics' lien claimed by said appellee upon the real estate in the possession of said appellant as a trustee in bankruptcy, was invalid. 2.

Second. In holding upon the record presented that said appellee was entitled to proceed on the contract for the entire amount of work done by it, and to maintain its statutory lien for whatever remained unpaid. 6.

Third. In holding that there is no claim that said appellee was in any way in default, nor any claim that the proper certificates from the architect would not be given at the proper time or times provided in the contract. 12.

Fourth. In holding that except for the matter of one thousand dollars for shutters and also for the absence of the architect's certificates the whole amount reserved by the

contract was due and payable at the time the lien suit was brought. 17.

Fifth. In attempting to apply to the case at bar, involving a partially completed building contract, the rule enounced concerning a contract for the future delivery of personal property in *Roehm* v. *Horst*, 178 U. S. 1. 11.

(Jurisdictional Questions.)

Sixth. In holding that the involuntary petition in bankruptcy was filed more than four months after the lien suit was commenced. 13.

Seventh. In holding that the adjudication as to said alleged mechanics' lien in said State Courts, could not be disturbed. 5.

Eighth. In failing to hold that said District Court and said Circuit Court of Appeals have authority to determine upon their merits the validity and amount of mechanics' liens claimed upon the real estate in the possession of a Trustee in Bankruptcy. 9.

Ninth. In accepting the results reached in the State Courts of New Hampshire as in any way affecting or binding said United States Courts. 10.

Tenth. In holding upon the record presented that said appellee was entitled to proceed in the State Courts to enforce said alleged mechanics' lien against the real estate in the possession of said appellant as a Trustee in Bankruptcy. 3.

(General Equities.)

Eleventh. In holding that the Supreme Court of New Hampshire held that all the facts essential to the creation and preservation of the lien had been found for the appellee in the New Hampshire Superior Court. 15.

Twelfth. In holding that the trial in the State Courts

was properly conducted and a full defence made by the assignee in insolvency. 14.

Thirteenth. In holding that the amount and validity of appellee's alleged lien has been passed upon by the State Courts upon its merits. 16.

Fourteenth. In holding that, neither as to the State Superior Court, nor the State Supreme Court, can it be said that the result came from any substantial default. 18.

Fifteenth. In holding that a full, complete and impartial trial was had in the State Courts. 19.

(Technical Questions.)

Sixteenth. In attempting to pass upon the merits of said alleged mechanics' lien, upon the record presented. 8.

Seventeenth. In affirming the decree of the United States District Court for the District of New Hampshire. 1.

Eighteenth. In failing to adjudicate that a permanent injunction should issue against said appellee to prevent the enforcement of said alleged mechanics' lien in the Courts of the State of New Hampshire. 4.

Nineteenth. In failing to remand said cause to said District Court for an adjudication of said alleged mechanics' lien upon its merits. 7.

Twentieth. In holding that said appellee was substantially entitled to the judgment for the lien claim which it obtained in the State Court.

General Legal Position.

The Dowst Company seeks to enforce in the State Courts of New Hampshire an alleged mechanics' lien to the amount of $45,995.02, with interest.

It seeks to enforce this lien against the real estate in the hands of a trustee in bankruptcy (appellant), and hence in the custody of the United States District Court.

It is our position that a creditor (even a preferred creditor) may not proceed against property in the custody of the Federal Court, except by a proceeding in that Federal Court. To state it broadly, when a United States Court takes into its custody real property of a bankrupt, it takes to itself the final disposition of that property and apportions it, or the proceeds thereof, among those who are justly entitled to it; it passes upon all claims against the property, including mortgages, attachments, pledges and liens.

In the present case, the Dowst Company commenced its suit to enforce its lien on Dec. 24, 1906 (Record, p. 32), in the New Hampshire Superior Court. This was before bankruptcy proceedings were begun, and it was entirely proper that the suit should be brought, to preserve the Dowst Company's rights.

But before four months had expired, on April 19, 1907, proceedings in bankruptcy were begun against the Breeders' Club, upon which a decree was entered December 31, 1907, and under which the trustee in bankruptcy took physical possession of the property February 10, 1908.

It is our position that it thereupon became the duty of the United States Courts to pass upon all alleged claims, mortgages and liens against the property, to the exclusion of any other court, and to enjoin the Dowst Company from proceedings against the property in the New Hampshire courts. A petition for an injunction was brought to invoke this jurisdiction and authority of the Federal Courts in this regard on April 14, 1908 (p. 35). We are here to maintain that jurisdiction and authority, and to invoke its exercise in this proceeding.

We concede that a trial of the facts was had in the Superior Court of New Hampshire, December 6, 1907, twenty-five days before the Club was adjudicated a bankrupt, but this was nearly eight months after the petition in bankruptcy was filed, April 19, 1907 (pp. 32, 33).

If there had been a fair trial upon the merits, so that a New Hampshire court of last resort had passed upon the questions of law and fact involved, we should expect some reluctance upon the part of this Honorable Court to disregard the proceedings of the New Hampshire court. When a litigant has had "his day in court," when his rights have been fairly passed upon by a court of competent jurisdiction, we may expect this court, in most instances, to accept the result so reached.

But in the present case a judgment has been entered against property in the custody of the Federal Court, *without a consideration of the merits of the case* upon a mere technicality, based upon a lawyer's blunder. This court is asked to permit a judgment so obtained to be executed against the property of the bankrupt.

And the lawyer's blunder, which resulted in this miscarriage of justice, was made before the trustee in bankruptcy appeared in the suit, and even before the adjudication in bankruptcy was made. The suit was tried and the blunder was made December 6, 1907, and the adjudication in bankruptcy was made Dec. 31, 1907 (pp. 32, 33, 43, 51, 52).

The blunder was a failure on the part of counsel to enter a technical motion in the New Hampshire Superior Court for a non-suit or a directed verdict before the case was submitted to the trial judge for a decision (p. 51). As a result of this mistake or omission of counsel for the assignee (not the trustee in bankruptcy), the New Hampshire Supreme Court refused to pass upon the material issues, the case went off on a technicality, and the primary exceptions were lost (pp. 52, 43).

There can be, therefore, no equitable ground for claiming that this trustee in bankruptcy ought to be concluded by a blunder to which he was in no sense a party.

We respectfully pray that the case be remanded to the District Court for a trial on the *merits* of the alleged lien.

We feel, however, that we should first show to this Honorable Court that there is at least reasonable ground to believe that the lien would be disallowed upon a fair trial of the merits. We proceed, therefore, to a discussion of the main question, to a discussion of the merits, to a consideration of the validity of the alleged lien.

First Point.

The Main Question,—The Validity of the Mechanics' Lien.

Enough facts appear in the record to show conclusively that the alleged lien has no legal standing. To that point we now call the attention of the court.

1.

The Statute.

It appears (p. 51) that the Dowst Company seeks to bring its suit in the State Court within the terms of the New Hampshire Statute on builders' liens, which is as follows:

> "Sect. 10. If a person shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, for erecting, altering, or repairing a house or other buildings or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien thereon and on any right of the owner to the lot of land on which the house, building, or appurtenances stand.
>
> "Sect. 16. The lien created by sections ten, eleven, twelve, thirteen, and fourteen of this chapter, shall continue for ninety days after the services are performed, or the materials or supplies are furnished, unless payment therefor is previously made, and shall take precedence of all prior claims except liens on account of taxes.
>
> "Sect. 17. Any such lien may be secured by attach-

ment of the property upon which it exists at any time while the lien continues,—the writ and return thereon distinctly expressing that purpose; and such attachment shall have precedence of all other attachments made after such lien accrued, unless founded on a prior lien."

N. H Pub. Stats., *c.* 141, *ss.* 10, 16 and 17.

We concede that the Dowst Company erected certain buildings for the Breeders' Club by virtue of a certain entire contract; and that within ninety days of performing their last work upon said buildings, they brought suit, based upon said contract, and made a special attachment under the provisions of the aforesaid statute.

We maintain, however, that they are not entitled to a mechanics' lien in said suit because

1. They deliberately, wilfully, and without legal excuse, failed to complete their contract;

2. Nothing is due and payable under said contract;

3. The contract is entire, no way is provided to apportion non-lienable items, and hence there is no lien for the lienable items.

2.

NEW HAMPSHIRE DECISIONS.

For the convenience of the court we furnish the following list of all the mechanics' lien cases which we find reported in New Hampshire:

Jacobs v. *Knapp*, 50 N. H., 71;
Bryant v. *Warren*, 51 N. H., 213;
Cheshire Prov. Ins. v. *Stone*, 52 N. H., 365;
Cole v. *Colby*, 57 N. H. 98;
Freeto v. *Houghton*, 58 N. H., 100;
Hill v. *Callahan*, 58 N. H., 497;
Hale v. *Brown*, 59 N. H., 551;
Eastman v. *Newman*, 59 N. H., 581;

Marston v. *Stickney*, 60 N. H., 112;
Foote v. *Scott*, 60 N. H., 469;
Pike v. *Scott*, 60 N. H., 469;
Hodgdon v. *Darling*, 61 N. H., 582;
Pitman v. *Thompson*, 63 N. H., 73;
Thompson Mfg. Co. v. *Smith*, 67 N. H., 409,
Kendall v. *Pickard*, 67 N. H., 470;
Quimby v. *Williams*, 67 N. H., 489;
Lawson v. *Kimball*, 68 N. H., 549;
Wason v. *Martel*, 68 N. H., 560;
Lavoie v. *Burke*, 69 N. H., 144;
Grafton Co. v. *Company*, 69 N. H., 177
Perrault v. *Shaw*, 69 N. H., 180;
Cudworth v. *Bostwick*, 69 N. H., 536;
Bixby v. *Whitcomb*, 69 N. H., 646;
Russell v. *Howell*, 74 N. H., 551;

3.

STRICT COMPLIANCE WITH STATUTE.

We have no concern with the equities of the case, or with the humane intentions of the Master.

It is established beyond controversy that a mechanics' lien is a creature of the statute, and can only be obtained by a strict compliance with the letter of the law.

Marston v. *Stickney*, 55 N. H., 383, 385;
Jacobs v. *Knapp*, 50 N. H., 71, 80;
Bicknell v. *Trickey*, 34 Me., 273, 281;
Trask v. *Searle*, 121 Mass., 229, 230;
Gale v. *Blaikie*, 129 Mass., 206, 209;
Wendell v. Abbott, 43 N. H., 68, 73;
Ellis v. *Lull*, 45 N. H., 419, 420;
Pierce v. *Cabot*, 159 Mass., 202;
Street Lumber Co. v. *Sullivan*, 87 N. E. (Mass.) 905;
General Fire Extinguisher Co. v. *Chaplin*, 183 Mass., 375, 378;
Grainger & Co. v. *Riley*, 201 Fed. (C. C. A. 6), 901, 903.

Street Lumber Co. v. *Sullivan*, 201 Mass., 484, 485;
Whalen v. *Collins* 164 Mass., 146, 150;
Am. & Eng. Ency. Law., 2d ed., 20; 269-71, 277;
27 Cyc., 20.

"This argument rests upon a misconception as to the nature and character of a mechanics' lien. This lien is a creature of the statute, and was not recognized at common law."

Van Stone v. *Company*, 142 U. S., 128, 136.

4.

MUST BE BASED ON EXPRESS CONTRACT WITH OWNER.

Under the New Hampshire and similar statutes, it is uniformly held that the lien suit must be based upon *an express contract* with the owner, in existence when the service is performed. It cannot be based upon a *quantum meruit*, or *implied assumpsit*.

Copeland v. *Kehoe*, 67 Ala., 594;
Rowley v. *James*, 31 Ill., 298;
Parker v. *Anthony*, 4 Gray, 289, 290;
Sanderson v. *Taft*, 6 Gray, 533;
Sly v. *Pattee*, 58 N. H., 102;
Pike v. *Scott*, 60 N. H., 469, 471;
Marston v. *Stickney*, 60 N. H., 112, 113;
Jacobs v. *Knapp*, 50 N. H., 71, 78;
Dressel v. *French*, 7 How. Pr. (N. Y.), 350;
Ellenwood v. *Burgess*, 144 Mass., 534.

The point need not be argued, however, for the present proceeding is found to be based upon the original contract, with subsequent additions and deductions (Record, p. 32).

5.

Contract Must Have Been Performed.

However the authorities may differ upon the question whether a lien may be created upon an implied contract, they all agree that, *in case there is an express contract,* there can be no lien unless the claimant show one of three things:

1. That he has performed the contract:

Rochford v. *Rochford,* 192 Mass., 231, 232;
General Fire Extinguisher Co. v. *Chaplin* 183 Mass., 375;
Rome Hotel Co. v. *Warlick,* 87 Ga., 34;
Thomas v. *University,* 71 Ill., 310;
Bohem v. *Seabury,* 141 Pa. St., 594;
Moritz v. *Larsen,* 70 Wis., 569;
Company v. *Berghoefer,* 103 Wis., 359;
Cahill v. *Heuser,* 2 N. Y. App. Div., 292;
Paturzo v. *Shuldiner,* 110 N. Y. S. (App. Div.) 137;
Gunther v. *Bennett,* 72 Md., 384;
Brick Co. v. *Spilman,* 76 Md., 337;
Derrickson v. *Edwards,* 29 N. J. Law (5 Dutch.), 468;
McGraw v. *Godfrey* 16 Abb. Prac. (N. S.) (N. Y.) 358;

or 2. That he has been *prevented* from doing so by the other party:

Howes v. *Reliance Wire-Works Co.,* 46 Minn., 44.
Knight v. *Norris,* 13 Minn., 473;
Dennistoun v. *McAllister,* 4 E. D. Smith (N. Y.) 729;
Kenney v. *Sherman,* 28 Ill., 520, 523;
Charnley v. *Honig* 74 Wis., 163;
Hutchins v. *Bautch,* 123 Wis., 394;

Catlin v. *Douglas*, 33 Fed. (C. C., D. Kans.), 569;
Sproessig v. *Keutel*, 17 N. Y. Supp., 839;

or 3. That performance has been waived:

Cahill v. *Heuser* 2 N. Y. App. Div., 292;
Floyd v. *Rathledge*, 41 Ill. App., 370;
McCue v. *Whitwell*, 156 Mass., 205;
Stewart v. *McQuaide*, 48 Pa. St., 191;
Am. & Eng. Ency. Law (2d ed.), 20; 366.

That performance of the contract is essential to the maintenance of a mechanics' lien is everywhere recognized. Reference to a single case is all that is necessary, and we select from the list *Extinguisher Company* v. *Herman W. Chaplin, Trustee*, 183 Mass., 375.

In that case, proceedings were begun to enforce the lien when all of an eleven thousand dollar contract had been completed except work to the amount of seventy dollars, and this was completed before the suit was tried. It was held, however, that the lien must fail for the reason that the entire contract must have been completed before the lien proceedings were instituted.

This case is very strong authority for our contention.

Company v. *Chaplin, Trustee*, 183 Mass., 375.

To the same effect are *Hains* v. *Graham & Bordley*, 111 S. W. (Ark.), 984, 986; *Pippy* v. *Winslow*, 125 Pac. (Or.), 298; *Klaub* v. *Vokoun*, 169 Ill. App., 434; *Evans* v. *Woodley*, 138 N. W. (Mich.) 275, and *Rochford* v. *Rochford*, 192 Mass., 231.

The Master has found (p. 30) that the Dowst Company wilfully failed to complete the shutters, at an estimated expense of $1,000 and (p. 32) that damage to the amount of $1,000 has been done on account of this failure.

It does not appear that the completion of the contract was *prevented* (although it was somewhat *delayed*) by the Breeders' Club.

It does not appear that performance of the contract was waived.

The only excuse for the failure to complete the contract is found by the Master as follows:

> "And so far as it is a question of fact, I find that the refusal on the part of the Breeders' Club to make its payments under the contract, constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract and from proceeding further with the construction work."
>
> Record, p. 30.

Whether the Breeders' Club failed to make its payments under the contract, and if it did, whether such breach constituted a legal excuse for the Dowst Company to abandon its work under the contract, are important questions of law in this case.

6.

BREACH BY ONE PARTY IS NO EXCUSE FOR FAILURE TO PERFORM BY THE OTHER PARTY.

Even if payments had become due under the contract, and had been refused by the Club, that would not have warranted the Dowst Company in abandoning further work under the contract and leaving it uncompleted.

It is elementary that failure to make payments under a contract, as the work progresses, does not entitle the contractor to abandon the work and sue under the contract, unless payment of the money is made a condition precedent to the completion of the work under the express terms of the contract.

There is no such condition in the contract in this case (pp. 19-25).

In one case where the validity of a mechanics' lien was in question, it was held that failure to pay an installment by one party was no excuse for abandoning the contract by the other. A quotation from the case follows:

> "It is the rule in this State that the mere fact that money which is to be paid as fast as the work progresses, is not paid by the owner when, by the terms of the contract, it ought to be, will not authorize the abandonment of the work and the recovery of a mechanics' lien for the work performed by the contractor unless the payments are made conditions precedent to the performance of the work by the express and positive provisions of the contract. . . . The failure to pay an installment when due is not such an act or omission as will prevent the other party from completing the contract. In order to obtain a lien the contractor must show that he has performed his contract, or that he has been prevented from so doing by the act of the other party."
>
> *Geary* v. *Bangs*, 33 Ill. App. 582-4-5.

> "In *Palm* and *Robertson* v. *R. R. Co.* 18 Ill. 217, 220, the court said they found no case where the failure to pay as the work progressed, according to the terms of the agreement, had been held such an act or omission on the part of the defendant as to prevent the other party from completing the contract. The payments should be made a condition precedent, by the express and positive provisions of the contract. They have not been so made by this contract. The petitioner, having abandoned the contract, appeals with a bad grace, for a preference by lien over all other creditors."
>
> *Kenney* v. *Sherman*, 28 Ill., 520, 523.

In considering generally the question whether or not the failure of one to pay an installment excuses non-perform-

ance in the other, the fact plainly appears that the best authorities in the country support the theory that such a failure is no excuse.

In the case of *West* v. *Bechtel*, 125 Mich., 144, all the English and American authorities are discussed, and the court reaches the conclusion that mere failure to pay one installment was not alone ground for abandoning the contract.

A case holding likewise is:

Winchester v. *Newton*, 2 Allen (Mass.) 492.

> "It seems to be settled, that where a person has received a part of the consideration for which he has undertaken to do some act, he cannot excuse himself for not performing it because he has not received the whole, unless it clearly appears that the payment of the whole consideration was a condition precedent to the performance."
>
> *Dox* v. *Dey*, 3 Wend. (N. Y.) 356, 361.

> "Where a contractor, acting in good faith, removes his men and tools, believing that he has fully completed his contract, but in fact slight omissions are found, which may be readily supplied or remedied, the liberal and just rule of substantial performance obtains in equity, and he may recover, a proper reduction from the contract price being made to indemnify the owner. . . . But we are of the opinion that the rule should not be applied with the same liberality in a case where, as here, the contractor deliberately abandons the work, without any pretense of having fully completed his contract, and solely on account of the failure of the owner to pay an installment intermediate the commencement and completion of the work."
>
> *M'Grath* v. *Horgan*, 76 N. Y. S. (App. Div.) 412, 415.

> "The plaintiff alleged in his petition that the coal company was released from all obligation to ship more

cars of coal than it did, for the reason that defendants failed to pay for the coal shipped within the time and in the manner provided by the contract. He now complains of rulings of the court which excluded evidence offered to sustain that issue. We discover no error in these rulings. The agreement provided for the payment for each shipment thirty days after it was made. The alleged breach did not go to the whole consideration of the contract, and the coal company did not, therefore, have the power to rescind the contract."

Osgood v. *Bauder*, 75 Iowa 550, 558;
Myer v. *Wheeler*, 65 Iowa 390;
Hanson v. *Heating Co.*, 73 Iowa 79.

"If the omissions are so substantial that the contractor would not have a right of recovery upon his contract, he cannot enforce a lien therefor."

Bianchi v. *Hughes*, 124 Cal., 24, 27.

"A mere default in payment of an installment, if not coupled with facts showing an intent on the part of the party in default to renounce his liability under the contract, does not operate as a discharge of the adversary party."

3 Page, Contracts, *s.* 1490 (7);
Mersey Co. v. *Naylor*, 9 App. Cas. (House of Lords) 434, supports this theory.
Also, *Cox* v. *McLaughlin*, 54 Cal. 605.

Canada has also accepted the general doctrine expressed on the subject.

Campbell v. *McLeod*, 24 Nova Scotia 66.

Chief Justice Shaw furnishes an interesting discussion as to when a condition is or is not one precedent, the nonperformance of which by one party will furnish excuse for the abandonment of the contract by the other party, in *Mill Dam Foundry* v. *Hovey*, 21 Pick. (Mass.) 417, 435, where at the trial he instructed the jury "that the advancement of

money, from time to time, to pay the defendant's workmen, was not a condition precedent on the performance of which the defendant was absolved from performance on his part," and at page 437 in the opinion said:

> "It seems to be well settled, that when there is a stipulation amounting to a condition precedent, the failure of one party to perform such condition, will excuse the other party from all further performance of stipulations depending upon such prior performance. But a failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part."

In order that a condition may be construed to be precedent, Judge Shaw says (*p.* 438) that it must appear, either

> "1. That the undertaking on one side, is *in terms* a condition to the stipulation on the other; as where one stipulates that he will perform the thing to be done, if the other shall have first performed some stipulation on his part; and even when words are used, which might be construed to be a condition in their ordinary sense, they shall not be so considered, if such construction is not consistent with the intent of the parties. . . . Or,
>
> "2. It must result from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance. When the act of the one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent, without express words.

. . . But when the act of the one is not necessary to the act of the other, though it would be convenient, useful or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, the performance of the one is not a condition to the obligation to perform by the other: or,

"3 The non-performance on one side must go to the entire substance of the contract, and to the whole consideration, so that it may be safely inferred as the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. And therefore though there be a breach of an express or implied covenant on one side, attended with some loss and damage to the other, yet if it does not go to the whole consideration, and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non performance of which the other party is absolved from the performance of the conditions on his part."

Mill Dam Foundry v. *Hovey*, 21 Pick. (Mass.) 417, 435, 437.

Quotations from cases bearing on the main heading of the present section which amply support the trustee's contention are now given.

"A breach of a covenant which does not go to the whole consideration of the contract, but is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. . . . And when a contract has been partially executed, and one of the parties has derived substantial benefits, or

has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance; but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation for the breach."

Howe v. *Howe & Owen Co.*, 154 Fed. (C. C. A. 8th Cir.) 820, 826, (Opinion by Sanborn, J.);

Kauffman v. *Raeder*, 108 Fed. (C. C. A. 8th Cir.) 171, 181.

"The defendant agreed in the written contract that he would keep the building insured for his and the contractor's benefit as it progressed against damage by 'fire, lightning, earthquake, cyclones or other casualty,' but he only insured it against fire. . . . It would seem that the failure to insure would not be a ground for quitting; it was not a condition precedent."

Paturzo v. *Shuldiner*, 110 N. Y. S. (App. Div.) 137, 139.

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

Boon v. *Eyre*, 1 H. Bl. 273 (Lord Mansfield).

7.

INSOLVENCY OF ONE PARTY IS NO EXCUSE FOR ABANDONING WORK BY THE OTHER PARTY.

The insolvency of the owner constitutes no legal excuse for abandoning the work under the contract. If the contract is rescinded or terminated, of course neither party can recover under it. A party who refuses to complete the con-

tract cannot recover under it. If he thinks he cannot collect when the contract is completed, he may stop work and recover under a *quantum meruit*. But if he wishes to enforce his lien, he must complete his contract, and bring suit under its terms.

Wherever the question has been directly raised, whether insolvency furnishes an excuse for the abandonment of a contract, a negative answer has always been given. And this rule has been applied as against either party who desired to abandon, whether the solvent or the insolvent. It prevails in England, Massachusetts, New Hampshire, New York, Illinois, Missouri and West Virginia. The latest case considering the point was decided in New York, a quotation from which follows:

> "Ordinarily the insolvency of a party to an executory contract of sale is not equivalent to a breach. *Pardee* v. *Kanady*, 100 N. Y. 121; *Vandegrift* v. *Cowles Eng. Co.*, 161 N. Y. 435. . . . I do not think that the bankruptcy of the defendants was necessarily to be considered as equivalent to a renunciation by them of the contract, or to a repudiation of their ability to perform."
>
> *Phenix Nat. Bank* v. *Waterbury*, 90 N. E. 435, 437, 197 N. Y. 161.

The Court of New Hampshire wherein the present case arose has placed its stamp of approval on the general proposition. In the particular case considering it, an insurance policy provided that if it were cancelled by the company the policyholder would be entitled to a *pro rata* part of the premium, and if cancelled by him, to the customary short rates.

The following question was submitted to the Supreme Court:

> "Shall policies surrendered by the insured before the appointment of the receiver in consequence of reports

of the probable insolvency of the company be cancelled *pro rata* or at short rates?"

By the Court, *Chase, J.* "The motive that has induced policy-holders to terminate their agreements is immaterial. The substance of the policies on this point, as stated in the case, is that the company could terminate the contracts 'on giving reasonable notice and paying a *pro rata* amount;' and that the insured could terminate them by request. The insolvency of the company, or a fear of its insolvency, or the appointment of a receiver, might be a reason which the insured would consider sufficient to act upon in exercising their right of terminating the contract. But they could terminate them without any reason. The insolvency or financial embarrassment of the company, operating as a moral compulsion upon the insured and forcing them to surrender their policies for the protection of their interests, would not alter the fact that the contracts were terminated by them and not by the company."

Ins. Com. v. *Ins. Co.*, 68 N. H., 51, 52, 54.

And in still another case the same court said:

"The insolvency proceedings did not revoke the defendant's contracts with the trustees, nor excuse the defendants from performing them."

Bank Comm'rs v. *Trust Co.*, 69 N. H. 621, 623.

In New York the point has been considered more often than anywhere else and the courts of that State have always maintained that insolvency of one party furnishes the other with no ground for abandonment of the contract.

N. E. Iron Co. v. *Gilbert E. R. R.*, 91 N. Y. 153;
Devlin v. *Mayor*, 63 N. Y. 8;
Merchant v. *Rawson*, 1 Clarke, Ch. (N. Y.) 123;
Underhill v. *North Am. Co.*, 31 How. Prac. (N. Y.) 34;
In re Carter, 47 N. Y. S. 383.

"The fact that the plaintiffs became insolvent after entering into the contract would not of itself have terminated the contract."

Hobbs v. *Columbia, etc., Co.*, 157 Mass. 109, 112;
Jewett Pub. Co. v. *Butler*, 159 Mass. 517, 520.

"It is not and cannot be disputed that the law is that, where a contract has been entered into between two parties, a doubt by the one of the solvency of the other will not justify a breach or non-performance thereof of the one doubting."

Lumber Co. v. *Co.*, 89 Mo. App. 141, 144.

"I agree . . . that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts."

In re Edwards, 8 Ch. App. (Eng.) 289, 293.

"Personal insolvency on the part of the contractors does not relieve them from the obligations of their contract nor legally justify their abandonment thereof." (Head Note).

McConnell & Drummond v. *Hewes*, 50 W. Va. 33.

"Another point made is, that the appellant was released from the obligation of his contract with Troxel and Hari, by reason of the fact that the latter had become insolvent.

"We do not understand this to be the law."

Brassel v. *Troxel*, 68 Ill. App. 131, 133.

Additional authorities which recognize the general principle are:

Boorman v. *Nash*, 9 B. & C. (Eng.) 145;
Wald's Pollock on Contracts (3d ed.), 355, *n.* 88;
Page on Contracts, *s.* 1449, *p.* 2243;
Benjamin on Sales, *p.* 808.

"The appointment of a receiver does not alter or affect the rights of parties to property, or give to or take from them any liens they have acquired or are entitled to."

Lumber Co. v. *Glasgow Co.*, 101 Fed. (C. C. A. 4), 863, 868.

8.

THE BREEDERS' CLUB DID NOT REFUSE TO MAKE ITS PAYMENTS UNDER THE CONTRACT.

The Master states in his report that the payments which the Breeders' Club refused to make under the contract, were certain notes for $28,000, which were given to the Dowst Company after receipt of an architect's certificate (pp. 30, 31).

These notes were not given under the contract, for the contract does not provide for anything but cash payments (*p.* 21). They were given merely as an accommodation to the Dowst Company, who were hard up, and appealed to the Breeders' Club to "help them out," at the same time admitting that "according to a strict construction of the terms of the contract, the remaining 20 per cent. may not be due." This was on September 24, 1906 (*p.* 27).

On September 26, 1906, the president of the Club replied that he could not send any cash, but would give notes for such an amount as the architect would include in their certificate. From the letter of the Dowst Company to the architect, it is apparent that they knew that they were not entitled to further payment until the contract was completed (*p.* 28).

The master finds, on incompetent evidence, that an architect's certificate was given on September 29, for $25,000 and notes were given to the Dowst Company for $28,000 on October 15th, 1906 (*pp.* 27, 28).

It should be remembered that these notes were authorized by the Directors of the Breeders' Club on September 17, 1906, twelve days before the architect's certificate was sent, and in the receipt by the Dowst Company, it was admitted that the contract was "not yet wholly performed" (*p.* 27).

It further conclusively appears from Plaintiff's Exhibit, No. 2, and from Trustee's Exhibits, Nos. 19 and 20, that when the directors voted to give the notes on September 17, 1906, and when the notes were given on October 19, 1906, the amount due under the contract, with additions to date, was $196,245, while the deductions and payments to date were $160,767, leaving a balance due under the contract, with additions and deductions, of $35,478. This balance was less than 20 per cent. of the entire amount of the contract, with additions and deductions to date ($196,245), and nothing more became due under the contract until order No. 12 (Plf's Ex. No. 2) for extras amounting to $9,648.20 was added to the contract December 7, 1906. Accordingly when the architect's certificate was given September 29, 1906, and when the notes were given October 19, 1906, nothing was due under the terms of the contract.

These figures will not be disputed by opposing counsel, but if it is considered essential by the court that the exhibits referred to should be made part of the record here, we trust some way may be found to have the record supplemented by the addition of these exhibits.

No architect's certificate has been given since order No. 12 was added to the contract December 7, 1906. Accordingly nothing has been due under the contract since September 17, 1906, and nothing is due under the contract now.

Moreover, under the express provision of the contract, no payment of money, nor any certificate given, shall "be evidence of the performance of this contract, or be construed as a waiver of any of its terms."

Record, *p.* 23.

9.

THE FINDING THAT THE ARCHITECT'S CERTIFICATE FOR $25,000 WAS GIVEN SEPTEMBER 29TH, IS BASED ON INCOMPETENT EVIDENCE.

The Master finds (p. 28) that the architect gave a certificate for $25,000 on September 29th, 1906. This finding is based on incompetent evidence, *i. e.*, a letter from the architects, Peters & Rice, to the Dowst Company. This letter was hearsay.

In the first place it is expressly provided by the contract (pp. 22, 23) that "The Architect shall not be deemed the agent of the Owner, *for any purpose whatsoever*, except as the Owner may in fact give him a special and express authority."

It is not found that such special and express authority was given in this instance. Therefore the letter of the architects was not competent as an admission made by the Club, or by its authorized agent.

Moreover, the letter from the architects was not explanatory of any letter received by them from the Club, or from the Dowst Company. It was only material so far as it contained a statement that the certificate had been sent. It was, therefore, hearsay, and incompetent, and the finding of the Master based upon it, is unauthorized and should be stricken from the report.

It should be noted that the letters of the Dowst Company to the architects or anyone else, were competent as admissions, but not so the letters of the architects to the Company.

It is also significant that Judge Peaslee did not receive in evidence this letter of the architects (p. 33).

10.

NOTHING IS DUE UNDER THE CONTRACT.

We have seen, Section 8, *supra*, that nothing is due under the contract. This is so for the further reason that under the express terms of the contract, payments become due only upon the performance of certain conditions (p. 26). These conditions are that:

1. The contractor "shall present to the architect a detailed statement, signed by him, of the amount of work done and incorporated in the building to the date of the statement."

(The Master does not find that this was done.)

2. "Unless the work to the date in question has been done in the manner herein agreed, and there has been no breach by the contractor of any of the provisions of this contract."

(It is found that the contractor has abandoned the work under the contract before completion, p. 30).

3. "Unless the contractor shall deliver to the owner the written certificate of the architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed."

(No such certificate has been delivered, and it could not be delivered because the contract has not been completed).

It is elementary that nothing can be recovered under a contract until the contract has been complied with.

Robinson v. *Crowninshield*, 1 N. H. 76;
Currier v. *Railroad*, 34 N. H. 398.

And so if a person shall undertake to improve my buildings under a contract, but does not comply with the terms of the contract, he cannot recover under the contract, for he has not done the work "by virtue of" the contract, but in

disregard of it. He may, however, recover under a *quantum meruit* or *quasi-contract*.

The point is well illustrated in the case of *Danforth* v. *Freeman*, 69 N. H. 466. There was a special contract and substantial completion of the work. There was, however, a failure to comply with the terms of the contract in the painting, and the damages for defective painting were fixed at $50, out of a total of $3,234.58. But the court held that the plaintiffs could not recover upon the contract, for the very good reason that the work had not been performed exactly (although substantially) according to the specifications. Upon this point the court says:

> "It is clear that the ground upon which the plaintiff recovers, where for failure of performance he cannot recover upon th econtract, is not the value of the work done, but the benefit received by the defendant."
> *Danforth* v. *Freeman*, 69 N. H. 466, 469;
> *Wadleigh* v. *Sutton*, 6 N. H. 15;
> *Dame* v. *Woods*, 73 N. H. 222.

If, then, a contractor who has failed in less than two per cent. of his undertaking, may not recover upon his contract, but is forced to rely upon his *quantum meruit*, we should naturally expect to find that a contractor who claims a lien for work done by virtue of a contract with the owner, must show that he has complied with the terms of his contract, or his lien must fail.

And such is the law.

The contract expressly provides, further, that no payment, acceptance, or certificate shall be evidence of compliance with the contract, or a waiver of its terms (p. 23).

It inevitably follows, therefore, that the final payment is not due under the contract.

It appears from Trustee's Exhibit, No. 19, that the total

contract price, with all additions and deductions, amounts to $205,893.02. Under the terms of the contract (p. 21) 20 per cent. of the contract price does not become due until 35 days after the contract is completed. And, since the contract has not been completed, even if its conditions had been complied with in other respects, 20 per cent. of the total is not yet due, amounting to $41,178.60.

So that the amount found due by the master ($45,995.02, p. 44) must be reduced by $41,178.60, leaving the amount due under the contract, in the most favorable light, $4,826.42.

11.

Nothing Being Due Under the Contract, No Recovery Can Be Had in the Lien Suit.

The Dowst Company having failed in various respects to comply with the terms of the contract, and nothing being due thereunder, the lien suit must fail.

> "An action cannot be brought to enforce a mechanic's lien before the contract has been completed and the money claimed under such contract has become due."
> Am. & Eng. Ency. Law (2d ed.), 20: 520.

> "As the creditor can maintain no action against the debtor until his demand is due and payable, he cannot until that time secure his lien by attachment. The cause of action and the perfected enforceable lien accrue to him at the same moment."
> *Kendall* v. *Pickard*, 67 N. H. 470, 473;
> *Kihlburg* v. *United States*, 97 U. S. 398;
> *Martinsburg &c. Co.* v. *March*, 5 Supr. Ct. Rep. 1035;
> *Palmer* v. *Clark*, 106 Mass. 373;
> *Chicago &c. Co.* v. *Price*, 11 Supr. Ct. Rep. 290;
> *Harmon* v. *Ashmead*, 60 Cal. 439;
> *Pitt* v. *Acosta*, 18 Fla. 270;

Thomas v. *Turner*, 16 Md. 105;
Lauer v. *Dunn*, 115 N. Y. 405;
Kinney v. *Hudnut*, 3 Ill. 472;
Preusser v. *Florence*, 4 Abb. N. C. (N. Y.) 136;
Schroth v. *Black*, 50 Ill. App. 168.

12.

DELAYS.

Another respect in which the contractor has failed here to comply with the contract is in the matter of delays.

The Master has found (p. 30) that the contractors did not complete the contract within the time specified, and he excuses them on the ground that the Breeders' Club delayed the work by failing to perform its part of the contract seasonably.

The fact remains, however, that the Dowst Company did not obtain a certificate for extension of time from the architect as provided in the contract under the head of "Strikes and other delays," nor did the contractors make a claim for extension of time in writing as therein provided (p. 30).

And since, by the express terms of the contract, time is made of the essence of the contract (p. 21), and no extension was obtained under its terms (p. 23), the contract was not complied with, and nothing is payable under it.

13.

DIFFERENCES BETWEEN SUBSTANTIAL PERFORMANCE AND ABANDONMENT OF THE WORK.

As a general rule if there has been an honest endeavor to complete the contract, and substantial compliance with its terms, a lien may be enforced.

Am. & Eng. Ency. Law, 2d ed., 20: 366-7;
27 Cyc. 85-7.

But the authorities are equally clear that a wilful omission in the performance of the contract, unless trivial, will preclude the assertion of a lien.

Am. & Eng. Ency. Law (2d ed.), 20; 367;
27 Cyc. 85, note 27;
Van Clief v. *Van Vechten*, 130 N. Y. 571, 579;
Elliott v. *Caldwell*, 43 Minn. 357;
D'Arnato v. *Gentile*, 173 N. Y. 596; 54 App. Div. 625;
Weeks v. *O'Brien*, 59 N. Y. Super Ct. 28;
May v. *Menton*, 18 Misc. (N. Y.), 737;
Kohl v. *Fleming*, 21 Misc. 690;
Fox v. *Davidson*, 36 N. Y. App. Div. 159;
Spence v. *Ham*, 27 N. Y. App. Div. 379;
Anderson v. *Todd*, 8 N. Dak. 158;
Federal Trust Co. v. *Guingues*, 74 Atl. (N. J.) 652, 654.
Braseth v. *State Bank*, 98 N. W. 79; 12 No. Dak. 486;
Wade v. *Haycock*, 25 Pa. St. 382;
Gillespie Co. v. *Wilson*, 123 Pa. St. 19;
Sherry v. *Madler*, 123 Wis. 621;
Roane v. *Murphy*, 96 S. W. (Tex.) 782;
Hahn v. *Bonacum*, 76 Neb. 837;
Gillis v. *Cobe*, 177 Mass. 584;
Burke v. *Coyne*, 188 Mass. 401;
Schindler v. *Green*, 82 Pac. (Cal. App.) 341;
Smith v. *Ruggeriero*, 173 N. Y. 614;
King v. *Moore*, 70 N. Y. S. 6.

14.

Architect's Certificate is Essential.

We have seen that there is no competent evidence that any architect's certificate has been given for any sum that has not already been paid under the contract.

That such a certificate is essential to recovery under a contract like this is undisputed.

Am. & Eng. Ency. Law, 2d ed., 20: 370; 30: 1205, 1237-9;
Addison on Contracts, *s.* 394;
27 Cyc. 87, note 38;
Henley v. *Walker* (Mich. 1890), 8 L. R. A. 207;
Packard v. *Van Schoick*, 58 Ill. 79;
Cocy v. *Lehman*, 79 Ill. 173;
Barney v. *Giles*, 120 Ill. 154;
Arnold v. *Bournique*, 144 Ill. 132;
Kirtland v. *Moore*, 40 N. J. Eq. 106;
Wolf v. *Michaelis*, 27 Ill. App. 336;
Provost v. *Shirk*, 223 Ill. 468;
Boots v. *Steinberg*, 100 Mich. 134, 135;
Boden v. *Mayer*, 95 Wis. 65;
Forster Lumber Co. v. *Atkinson*, 94 Wis. 578;
Nesbit v. *Braker*, 93 N. Y. S. 856.
Federal Trust Co. v. *Guingues*, 74 Atl. (N. J.) 652, 656.

15.

TWO KINDS OF WORK UNDER SAME CONTRACT, ONE LIENABLE, THE OTHER NOT, FOR LUMP SUM, NO LIEN.

Where a contractor engages to do different kinds of work under the same contract for a lump sum, upon part of which he is entitled to a lien and the other part not, it is held by all the authorities that no lien attaches in his favor.

> "An architect cannot maintain a petition to establish a mechanic's lien for labor performed under an entire contract to prepare plans and specifications and supervise the erecting of a building for a round sum of money, there being no lien for the work of preparing the plans and specifications" (Head note).
>
> *Libbey* v. *Tidden*, 192 Mass. 175, 177.
>
> "If labor and materials have been furnished and used in the erection of a building, under an entire contract,

with no stipulation for any separate price for either, and it is impossible to determine what part of the contract price is to be applied to either, and there is no mechanic's lien for the whole, there can be none for any part" (Head note).

Morrison v. *Minot*, 5 Allen (Mass.) 403;
Brewster v. *Wyman*, 5 Allen (Mass.) 405;
Graves v. *Bemis*, 8 Allen (Mass.) 573.

"One employed on salary to do such work as may be required, and doing lienable and non-lineable work indiscriminately, is not entitled to a mechanics' lien, since the court cannot undertake from extrinsic evidence to apportion the salary between the lienable and non-lienable items." (Head note.)

Getty v. *Ames*, 30 Or. 573;
Allen v. *Elwert*, 29 Or. 444.

This general doctrine is recognized by the authorities everywhere. See the following cases:

Driscoll v. *Hill*, 11 Allen (Mass.) 154;
Angier v. *Distilling Co.*, 178 Mass. 163;
General Fire Extinguisher Co. v. *Chaplain*, 183 Mass. 375;
Evans Marble Co. v. *Trust Co.*, 101 Md. 210;
McLain v. *Hutton*, 131 Cal. 132;
Peatman v. *Light & Power Co.*, 105 Iowa, 1;
Adler v. *Exposition Co.*, 126 Ill. 373;
McMaster v. Merrick, 41 Mich. 505;
Edgar v. *Salisbury*, 17 Mo. 271;
Sweem v. *Railroad Co.*, 85 Mo. App. 87, 95;
Baker v. *Fessenden*, 71 Me. 292;
Rinzel v. *Stumpf*, 93 N. W. (Wis.) 36.

It is found by the master (Record, p. 15) that in addition to the buildings included in their contract with the club, the Head & Dowst Company, for the lump sum of $187,644, was to furnish certain sidewalks, platforms, fences and a jockey board on the premises at Salem, New Hampshire.

Note where they were situated. The sidewalks were made of brick laid on the ground without cement, and were simply used for walks between the various buildings. The platforms were laid down at the ends of the sidetracks outside of the grounds, in proximity to no building whatever. The fences were built to exclude the public from the grounds and were appurtenant to no building. The same is true of the large jockey board (Record, p. 16).

The master finds (Record, (p. 16) that these various things were attached to the realty. This the appellant does not dispute. But the master does not and could not on the facts find that they were in any way a part or appurtenance of a building. Under the New Hampshire law they must be in order to be lienable and that they were a considerable item of the contract is apparent from the fact that the fence was built to exclude people from the grounds, that the walks extended between the various buildings and that the platforms outside of the grounds were designed to accommodate the people patronizing the track.

In *Thompson Mfg. Co.* v. *Smith*, 67 N. H., 409, it is said on this question of lienable or non-lienable items:

> "The burden rests upon the plaintiff to prove the lien which they assert. The engine was not a building within the meaning of the statute, and it does not appear to have been a part or an appurtenance of a building when the repairs were made. It was portable. It might be placed in a building, and yet be neither a part nor an appurtenance of the building. It does not appear even that the 'sawmill' in which the engine was at one time situated was a building. It might have been nothing but a saw operated by the engine in the open air, or under a temporary cover. *State* v. *Livermore*, 44 N. H. 386."

Thompson Mfg. Co. v. *Smith*, 67 N. H., 409, 410;
Grafton &c. Co. v. *Company*, 69 N. H., 177;
Meek v. *Parker*, 63 Ark., 367;
Baum v. *Covert*, 62 Miss., 113;
Turner v. *Wentworth*, 119 Mass., 459;
Harrison v. *Asso.*, 134 Pa. St., 558.

To sum up on this point. There was an entire contract for a lump sum to do certain things, part lienable and part not. No way for apportioning the items is expressed in the contract. It is impossible to ascertain how much of the lump sum was charged for lienable and how much for non-lienable items. The authorities in such a situation are all one way and the lien must fail.

16.

Extent of Lien.

It clearly appears from the Master's Report (*pp.* 31, 32) that certain real estate was bought by Andrew Miller, the president of the Club, which was not needed for racing purposes.

> "These areas were included in the land covered by the deed of Andrew Miller to the New England Breeders' Club, and were set off by the Club from the parts of the track actually used for racing purposes, by fences built by the Club, after the acquisition of the property."
>
> Report, *pp.* 31, 32.

It is clear that the land outside the fence, including the McKinnon house, "the land northerly and westerly of New Pleasant Street, and the land southerly and westerly of the railroad sidetracks," (*pp.* 31, 32), was *not* necessary for the convenient use of the grounds as a race course, that it was

not treated by all concerned as one parcel, and that it had *not* been used for a common purpose. The McKinnon house, indeed, was not only outside the fence, but "was leased by the Club to some one not connected with the tracks, and was not occupied by any one connected with the Club" (*p.* 31).

It follows that the McKinnon house, the land northerly and westerly of New Pleasant Street, and the land southerly and westerly of the railroads, were not "reasonably necessary for the occupation of the buildings included in the contract, for the purposes intended."

27 Cyc., 221, 222.
Am. & Eng. Ency. Law, 2d ed., 20: 281;
Federal Trust Co. v. *Guingues*, 74 Atl. (N. J.), 652, 656.

The case most nearly in point concerns the fair grounds of an agricultural society (presumably for breeding purposes), consisting of about sixty acres of land, with race track, grandstand, corrals, stables and other improvements. It was held to be error to establish a lien on the entire premises in favor of persons who constructed a building on such grounds to be used as a hotel, club house and saloon.

Tunis v. *Asso.*, 98 Cal., 285;
Storage Co. v. *Foundry Co.*, 105 Pa. St., 248;
Cowan v. *Griffith*, 108 Cal., 224;
Colorado Iron Works v. *Taylor*, 12 Colo. App., 451.

17.

SUMMARY.

It is our general position that the validity of the lien depends upon the *status* of the lien suit in the State Court; that that suit is brought upon the special contract; that nothing is due under the special contract, because its terms have not been complied with; that, in particular, the contract has not been completed by the *Head & Dowst Company;* that completion of the contract, without adequate excuse, is essential to the maintenance of a suit under the contract; and that insolvency of the Club, failure to make payments and action by its officials as outlined in the Master's Report, furnish no adequate excuse for failure to complete the contract and otherwise comply with its terms.

a.

General Bearing of Insolvency.

Insolvency of the owner gives to the contractor no right to abandon his contract, neglect to comply with its terms and bring suit upon it to enforce a mechanic's lien.

Performance by the contractor must always be a condition precedent to the right to enforce payment. The right to enforce payment must always be a condition precedent to the right to maintain an action for payment under the contract. Hence the contractor can maintain no suit under the contract until he has performed his part of the contract.

If the owner becomes insolvent, the condition precedent, *i. e.*, performance of the contract, does not thereby spring into being. On the contrary, the contractor here seizes upon the owner's insolvency as an excuse for ***not performing the contract.*** If now the owner's insolvency were the same thing as performance, the entire contract price would at once become due, which is a manifest absurdity. All that

the owner claims is a right to cease work, and collect, not the contract price, but the contract price *less what should be allowed for failure to complete the contract. In other* words, the contractor does not seek to collect the contract price at all, but what his work is fairly worth in its uncompleted state. That is, he seeks to recover, not the amount due him under the contract (which is nothing), but a *quantum meruit.*

We thus see that insolvency may be a *reason* for abandoning the contractor's rights under a contract and taking refuge in a *quantum meruit,* but it is never an excuse for non-performance in the sense that anything short of compliance with the contract will justify a contractor in maintaining suit to enforce payment under its terms.

And so if a person shall undertake to improve my buildings under a contract, but does not comply with the terms of the contract, he cannot recover under the contract, for he has not done the work "by virtue of" the contract, but in disregard of it. He may, however, recover under a *quantum meruit* or *quasi*-contract.

The point is well illustrated in the case of *Danforth* v. *Freeman,* 69 N. H., 466. There was a special contract and substantial completion of the work. There was, however, a failure to comply with the terms of the contract in the painting, and the damages for defective painting were fixed at $50, out of a total of $3,234.58. But the Court held that the plaintiffs could not recover upon the contract, for the very good reason that the work had not been performed exactly (although substantially) according to the specifications. Upon this point the court says:

> "It is clear that the ground upon which the plaintiff recovers, where for failure of performance he cannot recover upon the contract, is not the value of the work done, but the benefit received by the defendant."

Danforth v. *Freeman*, 69 N. H., 466, 469;
Wadleigh v. *Sutton*, 6 N. H., 15;
Dame v. *Woods*, 73 N. H., 222.

If then a contractor who has failed in less than two per cent of his undertaking, may not recover upon his contract, but is forced to rely upon his *quantum meruit*, we should naturally expect to find that a contractor who claims a lien for work done by virtue of a contract with the owner, must show that he has complied with the terms of his contract, or his lien must fail.

We do not suggest that a contractor *must* proceed to complete his contract with an insolvent owner in order to collect by legal process what is fairly due him; nor that a Court of equity will enforce specific performance; nor that it may not be good judgment to stop the work where it is, and rely upon a *quantum meruit*. Our point is that a contract is a contract; that unless its terms are fulfilled, payment *under it* does not become due; and no suit upon the contract, in New Hampshire at least, can be maintained by one who has deliberately chosen *for any reason* not to perform it.

It follows inevitably that *this contractor*, who has confessedly not performed his contract, cannot maintain his suit *upon the contract*. His action must, therefore fail, for it is based upon the contract, not upon a *quantum meruit*.

"As appears from the pleadings, the action (in the State Court) *was based upon the original contract.*"
Master's Report, *p.* 32.

Therefore the suit to enforce the lien must fail because it is based upon the original contract, and no suit can be maintained upon the original contract because its terms have not been fulfilled, and the contract has not been performed in full.

We thus see that if a contractor has failed to take security for his payments, and the owner becomes insolvent, he is not excused from performing his contract in the sense that he may stop work and sue for the contract price. The insolvency of the owner places the contractor in a position where he must take his choice of two remedies:

> (1) Complete his contract and by that method place himself in a position where he may maintain his suit under his contract and enforce his mechanic's lien, or
>
> (2) Stop where he is, fail to complete his contract, sue on a *quantum meruit*, lose his lien and become a general creditor in such sum as the court shall award upon consideration of what the work is fairly worth to the estate.

Where there is one entire contract price, there is no way to apportion the amount that shall be allowed for the work that has been actually done: the only refuge is a *quantum meruit*. We shall see later (Section 4) that a mechanic's lien cannot be based upon a *quantum meruit*. In this case no attempt is made to base it upon that form of action.

This claimant, having deliberately chosen to abandon the contract, applies with a poor grace for a preference over all other creditors.

Why, indeed, should the creditor who has put $45,000 into the buildings, stand any better in a bankruptcy court than the creditor who has loaned $50,000 to the owner to make a payment to the contractor on account of the building contract?

The only reason is because Section 67d of the Bankruptcy Act gives a preference to *valid* mechanic's liens. This does not mean that this Court is interested to help any creditor out at the expense of the others. It means that if, upon investigation, the lien appears good under a strict construc-

tion of the statute (which is in derogation of the common law), then the lien holder is entitled to have his lien enforced. But if he has not complied with the letter and spirit of the statute, he has no valid lien, and he must share with the other creditors. The court has no right to strain a point in his favor, or to apply equitable remedies. It is no hardship to any creditor who has neither security, mortgage, nor a good lien, to share with the general creditors.

What the Court might *give* to him from an impulse of generosity it would *take* unjustly from others who are equally worthy.

b.

Waiver.

If performance of the contract was *waived* by the owner, the contractor would thereby be protected from a suit for damages for failure to complete the contract. But such a waiver would not amount to *performance* in the sense that the contract price would then become due. The contract not having been performed, the contract price would *not* become due, but such sum might become due as the work done was fairly worth. Waiver excuses performance, *i. e.*, removes danger of suits for damages for failure to perform; but waiver furnishes no consideration for the recovery of the contract price. This is elementary.

Assuming that the president of the Club had full authority to waive performance, no waiver is shown.

In the first place, the Master does not find that *performance was waived.*

He finds (*p.* 30) that the *Dowst Co.* abandoned work under the contract, ***not because the performance was waived, but because the notes given on October 15th were not paid, and because the Club was considered insolvent.***

From the facts stated no waiver can fairly be inferred.

The Master finds as a matter of *fact* (*p.* 30) that *the failure of the Club to make its payments under the contract constituted such a breach of the contract on its part, as to entirely warrant the Dowst Co. in abandoning further work under the contract.*

Here is no waiver of performance, but *a right to abandon claimed and exercised.*

As a matter of law and fact, every payment which had become due under the contract had been fully met; moreover, if there had been a failure to pay anything under the contract, such failure was no more an excuse for abandoning the work than a failure to pay rent gives the landlord a right to evict his tenant.

A breach by one party gives the other party a right to sue for damages, but not a right to violate the contract.

We claim that notice to the *Dowst Co.* that the Club could not pay, and that they "must look to their lien to support their claim" (*p.* 29), was no *waiver,* but a *notice* to the *Dowst Co.* to rely upon their strict legal rights. They were thus notified that the Club was insolvent, and that the Club's real estate would be assets for which they must contend with the general creditors of the Club. They were thus *put on their notice,* that if they did not proceed strictly in compliance with the law, they would lose their lien. They acted with their eyes wide open; they acted on the knowledge that the Club was insolvent, and their contract was not completed, and nothing was payable under it. They did not rely on a waiver, for none had been made.

But assume that *Miller's* statement was a waiver, and that he was fully authorized to make such waiver, so far as *the Club* was concerned.

It should be remembered that he knew that the Club was insolvent, and that the general creditors of the Club had rights. How far could *Miller,* by his act of waiver,

by his burst of generosity to the *Dowst Co.*, affect the rights of the general creditors whom we represent before this court?

Such a waiver by the president of the Club would constitute an attempted preference, and would be a fraud upon the Bankruptcy Act.

To make the point plain, let us assume that Miller's act was in writing, signed, sealed and delivered, ratified by the directors and stockholders. It would then amount to a deed of conveyance, which is certainly stronger than a verbal waiver.

But such a conveyance or transfer made within four months of the filing of the bankruptcy petition, would be a fraud on the act, and void under Section 67e.

We claim, moreover, that this waiver, if there was one, was not made "in good faith," but was made "in contemplation of or in fraud upon" the bankruptcy act as defined in *s.* 67d.

We insist that a lien founded upon a waiver of performance by a bankrupt debtor, in an attempt to create a preference over all other creditors, is not a lien "given or accepted in good faith."

" 'Good faith' means that the creditor should not act in such a way as to intentionally defeat the Bankruptcy Act, but should let the debtor have the money or property for some honest purpose."

Remington on Bankr., *p.* 899.

We refrain from multiplying authorities along this line. It is plain that a waiver of performance could have no efficacy unless it had the effect, by voluntary act of the bankrupt, to turn the property over to the contractor without consideration, *i. e.*, performance. And such an abandonment of all the estate of the bankrupt to one creditor with-

out consideration, creates an illegal preference just as surely as a deed of assignment without consideration.

Bankr. Act., *s.* 67d.

18.

RHOEM v. HORST.

We have extended our argument on the main question in order that the Honorable Court may clearly see the distinction between an entire contract for the erection of buildings on the owner's real estate, and an entire contract for the delivery of personal property.

The court below failed to note this distinction, and decided against us upon the lien question on the strength of *Rhoem v. Horst*, 178 U. S., 1.

Rhoem v. Horst, supra, declares a familiar rule embracing the following propositions:

a. After the renunciation by one party of a continuing agreement to deliver *personal property*, the other party is exused from further performance, or tender of performance, and may at once bring suit for breach of contract.

b. The measure of damages is the difference between the contract price and the market price.

It is plain that this rule could apply to a building contract only in case no work had been done under it. There would then be a right of action for breach of contract, and the measure of damages would be the difference between the contract price and the market price, *i. e.*, what it would cost to construct the building at going prices.

It should be equally plain that where the building has been partially completed, an action for the breach to recover the unearned profits, would not be enough; the principal ground of recovery would be compensation for the portion already constructed, including what it actually cost at going prices, as well as the profit on that portion.

All authorities agree that in case of an uncompleted

contract for an entire price, the action is on a *quantum meruit*, and the measure of damages, where most of the work has been done, is the contract price, less what it would cost to complete the work (69 N. H. 466, 468, 469).

The rule is laid down as follows in Clark on Contracts, section 255:

> "Where a contract is broken by one of the parties, the other party acquires, or may acquire three distinct rights:
>
> "(*a*) He may be discharged from further performance.
>
> "(*b*) If he has done anything under the contract, he has a right to sue on the *quantum meruit*, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law.
>
> "(*c*) He has a right of action on the original contract, or term of the contract broken, and may maintain:
>
> "(1) A suit to obtain damages for the loss sustained by the breach.
>
> "(2) A suit to obtain specific performance of the contract by the other party."

Clark on Contracts, section 255.

(Note that the right to recover for what has been done under the contract, is a cause of action distinct from that arising out of the original contract.)

The entire ground of recovery in the suit at bar was for what had been done under the contract; hence the entire cause of action arose from an implied contract; none of it was grounded on the contract itself, or any breach of that contract.

It is plain that *Rhoem v. Horst*, 178 U. S., 1, *supra*, is no authority for any one of the following propositions:

a. The inability of the owner to pay the contract price is a sufficient excuse for the contractor to abandon work on the owners building; or

b. Failure or refusal to make payments is a sufficient excuse for such abandonment; or

c. Such inability, failure, or refusal, advances the time when payments are due under such contract; or

d. Such inability, failure, or refusal, gives a present right of action when nothing is due or payable under such contract; or

e. A lien suit may be maintained under a contract when nothing is payable under its terms; or

f. A party to a building contract, may in any case enforce his mechanics' lien for labor and materials, whether he completes his contract or not; or

g. A party to a building contract may in any case recover any payment under such contract whether he has fully performed every condition precedent to such payment, or not.

To entitle the plaintiff in this case to maintain his mechanics' lien suit, authority must be found for the foregoing propositions. *Rochm* v. *Horst*, *supra*, is authority for none of them; hence the opinion which is based on *Rochm* v. *Horst*, is unsound.

It is clear that the Circuit Court of Appeals fell into a plain error in resting its decision upon *Rochm* v. *Horst*, *supra*. We venture to state that this error was no more startling (though less agreeable) to us than to counsel for the Dowst Company, who never cited *Rochm* v. *Horst* in brief or argument.

The distinction, of course, rests in the peculiar characteristics of *real property* to which the materials contracted for are attached under a building contract. The result has been a special department of rules of decisions which are grouped generally under the head of "Builder's Contracts" in every text book of considerable scope. *Rochm* v. *Horst*, *supra*, will not be found as an authority for any proposition

under that head. It applies only to the delivery of *personal* property.

Second Point.

The Jurisdictional Question—the Binding Effect of Proceedings in State Courts.

We have now considered the main question of the validity of the mechanic's lien claimed by the Dowst Company, and we have discussed the various phrases of that question raised by the first group of errors noted in our specification, page 7.

We now come to the Jurisdictional Question, and proceed to discuss in some detail the right of the United States Court to take to itself, with the real property of the bankrupt, all controversies concerning alleged liens, pledges and mortgages upon that property.

In order to determine the merits of this question, we must first decide whether this proceeding is a regular step *"in bankruptcy proceedings," or "a controversy arising in bankruptcy proceedings."*

1.

A Controversy Arising in Bankruptcy Proceedings.

The decree from which our appeal is taken, is upon the Trustee's petition that the alleged lien of the *Dowst Company* be adjudicated in the United States District Court (Record, p. 58). The record discloses, therefore, a "controversy *arising in bankruptcy proceedings*" rather than a regular step *"in bankruptcy proceedings,"* so that it falls under Section 24 (a), rather than Section 25, of the bankruptcy act.

Although we thought it prudent in the court below to file a petition for revision in addition to our appeal, thus

following the suggestion made by that court in *Fisher* v. *Cushman,* 103 Fed. 860, we have no doubt that the appeal was properly taken under said Section 24 (a).

Hutchinson v. *Otis,* 190 U. S., 552;

Burleigh v. *Foreman,* 125 Fed. 271 (C. C. A. Mass.);

Mason v. *Wolkowich,* 150 Fed., 699 (C. C. A. Mass.);

Rem. on Bankr., ss. 2870, 2871, 2882, 2900, 2912, 2923;

Hewitt v. *Berlin Machine Co.,* 11 A. B. R. 709 (U. S. Sup. Ct.);

In re Friend, 134 Fed. 778 (C. C. A. 7th Cir.);

Plymouth Cordage Company v. *Smith,* 194 U. S. 311;

In re First National Bank of Canton, 14 A. B. R. 180 (C. C. A. 6th Cir.);

Liddon & Bro., v. *Smith, et al.,* 135 Fed., 43 (C. C. A. 5th Cir.).

2.

BOTH LAW AND FACT ARE TO BE REVIEWED.

Since the appeal comes within the provisions of Section 24 (a), this Honorable Court will review both questions of law and questions of fact.

Elliott v. *Toeppner,* 187 U. S. 327;

Bank v. *Chicago &c. Co.,* 198 U. S., 280;

Remington on Bankr., s. 2881.

3.

QUESTIONS OF DISCRETION ARE FOR THIS COURT.

Not only are questions of fact (including discretion) always to be reviewed by this Honorable Court upon appeals

of this character, but in this particular case "all questions of discretion" are especially reserved by the Honorable District Court by his own wish. (Record, *p.* 58.)

In matter of procedure, as well as in substance, this appeal is to be treated like any other appeal in equity.

In re Baker, 104 Fed. 287 (C. C. A. Mass.);
Mason v. Wolkowich, 150 Fed. 699 (C. C. A. Mass.);
Bardes v. Bank, 178 U. S. 533.

4.

THE POWER OF THE BANKRUPTCY COURT.

The decree in this case is based as we have seen upon the petition of the Trustee in bankruptcy that the alleged lien of the *Dowst Company* be adjudicated in the District Court (Record, *p.* 58). It appears further that the lien proceedings in the State Court were directed against property which was in the custody of the District Court and actually in the hands of the Court's trustee in bankruptcy (*pp.* 32, 43).

Under these circumstances the *power and authority* of the Federal Court to retain jurisdiction of all claims against property in its custody, cannot be doubted.

New River Coal Co. v. *Ruffner Bros.*, 165 Fed. (C. C. A. 4th Cir.) 881;
In re Dana, 167 Fed. (C. C. A., 8th Cir.) 529;
In re Driggs, 171 Fed. (D. C. S. D., N. Y.) 897;
In re Knight, 125 Fed. (D. C., Ken.) 35, 39, 42-5;
In re Emslie, 102 Fed. (C. C. A., 2d Cir.) 291;
In re Watts, 10 A. B. R. (U. S. Sup. Ct., 1903) 113, 124; 190 U. S., 1;
Matter of Cameron, Currie & Co., 20 A. B. R. (D. C., Mich.) 790, 794;
Blake v. *R. R.* 3 Fed. (C. C. A., Ohio), 586;

Bear v. *Chase*, 99 Fed. 920;
In re Kenny, 97 Fed. 554;
In re Russell, 101 Fed. (C. C. A., N. Y.) 248;
In re Goldberg, 117 Fed. 692;
In re Hornstein, 122 Fed. 266;
In re Breslauer, 121 Fed., 910, affirmed in *Clarke* v. *Larremore*, 188 U. S., 486;
In re Lesser Bros., 5 A. B. R., 320;
Blake, Moffitt & Towne, et al., v. *Francis Valentine Co., et al.*, 1 A. B. R. 372;
Carter v. *Hobbs*, 1 A. B. R. 215;
In re Charles E. Northrop, 1. A. B. R. 427;
In re Chas. D. Adams, 1 A. B. R., 94;
In re Ball, 118 Fed. 672;
In re John Kerski, 2 A. B. R. 79.

"Court proceedings whereby it is attempted to levy upon or seize property in the custody of the bankruptcy court may, of course, be enjoined."
Remington on Bankruptcy, *s.* 1908;
White v. *Schloerb*, 178 U. S. 542;
In re Lemon & Gale Co., 112 Fed. 296;
In re Huddlestone, 1 A. B. R. 572;
In re Whitener, 105 Fed. 180.

The authorities are also numerous as to the correct *practice.*

New River Coal Land Co. v. *Ruffner Bros.*, 165 Fed. (C. C. A., 4th Cir.) 881;
In re Dana, 167 Fed. (C. C. A., 8th Cir.) 529;
In re Driggs, 171 Fed. (D. C. S. D., N. Y.) 897;
In re Knight, 125 Fed. (D. C., Ken.) 35, 39, 42-5;
In re Emslie, 102 Fed. (C. C. A., 2d Cir.) 291;
In re Falls City Shirt Mfg. Co., 98 Fed. 592;
In re Schermerhorn, 145 (C. C. A.) 341;
Whitney v. *Wenman*, 198 U. S., 539;

In re N. Eng. Piano Co., 122 Fed. (C. C. A., Mass.) 937;
Chauncey v. *Dyke Bros.*, 119 Fed. (C. C. A., Ark.) 1;
Roofing Co. v. *Penn. Inst.*, 8 A. B. R. (D. C., Penn.) 742;
In re Rochford, 124 Fed. (C. C. A., So. Dak.) 182;
In re Russell, 101 Fed. (C. C. A., 2d Cir.) 248;
Rockel on Mech Liens, p. 475, *n.*

The principle that State Courts have no right to interfere with property in the possession of a trustee in bankruptcy, has been recently conceded by the New Hampshire Supreme Court in a replevin suit in these words

> "The State Courts have no jurisdiction of an action of replevin against a trustee in bankruptcy."
> *Concord &c. Co.*, v. *Couch* (June, 1909), 75 N. H. 593.

5.

SHOULD THE POWER OF THE FEDERAL COURT BE EXERCISED.

The power of the Federal Court to take to itself "all litigation in respect to a bankruptcy estate and as to property in the possession of the bankruptcy trustee" seems to be conceded by the Honorable District Court in the opinion of January 6, 1910 (Record, p. 49). It is there said:

> "Where there is concurrent jurisdiction the court that first takes hold of the *res* in a controverted situation may hold the ground. . . . . The exact and only question is the status of the lien under New Hampshire law. The parties are entitled to have that question passed upon by some suitable court."
> Record, p. 49.

It is our contention that no court of last resort has passed upon the legal questions involved in the validity of the alleged lien, that the State Court has refused, on account of a technicality to consider those questions; and that the Federal Courts will not permit one creditor to take advantage of all the other creditors because of a blunder made by counsel before the corporation was adjudged a bankrupt, but will investigate the alleged lien and dispose of it according to the actual merits of the case.

GENERAL APPLICATION OF THE FOREGOING PRINCIPLES.

Before we compare the principles laid down by the foregoing authorities, with the opinion of the Circuit Court of Appeals, we desire to call attention to the mistake of that court in stating that the petition in bankruptcy was filed "more than four months after the lien suit was commenced" (Record, p. 63).

It clearly appears from the record, however, that the petition in bankruptcy was filed April 10, 1907 (p. 32), which was well within four months of the beginning of the lien suit, Dec. 24, 1906 (p. 32).

It thus appears that the bankruptcy proceedings were begun in season to dissolve completely an ordinary attachment, and to render imperative a careful examination of the strict legal rights of any party claiming an extraordinary attachment.

Upon the cases alreay cited, it clearly appears that it was the undoubted right of the United States District Court

a. To investigate the alleged lien of the Dowst Company and prevent by injunction any proceedings in the State courts which might tend to disturb the possession of the bankrupt estate in the hands of its trustee;

b. To determine upon their merits the validity and amount of mechanic's liens claimed upon the real estate in the possession of the trustee in bankruptcy;

c. To decline to accept the results reached in the State courts of New Hampshire as in any way affecting or binding the United States courts;

d. To hold, upon the record presented, that the Dowst Company had no right to enforce its alleged lien in the State courts.

So far as the Circuit Court of Appeals took position in its opinion, contrary to the foregoing propositions, we ask that said positions be declared erroneous and that the same be duly corrected.

THIRD POINT.

General Equities.

In the opinion of the Circuit Court of Appeals, it was stated substantially that:

1. The Supreme Court of New Hampshire held "that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the superior court." p. 65.

2. "We have no reason to doubt that the trial in the superior court was properly conducted and full defence made by the assignee in insolvency." p. 65.

3. In the superior court "a full, complete and impartial trial was had." p. 63.

4. Neither as to the superior court or the Supreme Court "can it be said that the result came from any substantial default." p. 66.

These statements by the court below indicate clearly what sort of trial should have been had in the superior court, and what sort of questions should have been raised for the consideration of the Supreme Court, to bind the trustee in bankruptcy to the result of a suit in which he was not a party.

We have seen, however, that these statements are incorrect; that by a blunder of counsel, the merits of the case were never passed upon, and the legal questions involved were not considered.

It is clear, therefore, that the general equities are with the appellant.

Fourth Point.

Technical Questions.

The technical points as to the form of the decree and the proceedings in the court below, in case the cause is remanded to the Circuit Court of Appeals, need little consideration at this time.

If it shall appear to this Honorable Court, that the record is sufficiently complete to warrant a final decision on the merits of the case, a permanent injunction should be ordered which would clear from the bankrupt estate the cloud raised by the Dowst Company's claim. We feel, however, that the record is not in a condition to warrant a final decree, but that justice would be best served by sending the case back to the district court to have the merits of the lien fully heard before that court.

In no event, we feel confident, should the decree of the Circuit Court of Appeals and of the district court be allowed to stand.

No decree should stand in favor of the Dowst Company until the cause has been fully heard on its merits in some court of competent jurisdiction, after the trustee in bankruptcy and his counsel have been fully heard.

Fifth Point.

There remains to discuss the motion to dismiss filed by the Dowst Company in this Honorable Court, November

29, 1913. It is probable that the argument in the main cause may be reached before the day noticed for hearing the motion to dismiss. In that case we assume that the motion to dismiss and the main cause will be heard together. We therefore proceed to argue the motion in this brief.

Two points are urged in the motion to dismiss. The first goes to the general jurisdiction of this Honorable Court upon the record herein.

The second point goes to special right to appeal in a case of this nature.

A.

APPELLEE'S FIRST POINT—JURISDICTION.

The authority of the United States Courts to assume jurisdiction of all questions affecting the bankrupt's real estate, is fully argued by us under our Second Point, pages 51 to 57, herein. We have nothing to add to this phase of the question.

B.

APPELLEE'S SECOND POINT—RIGHT TO APPEAL.

This question arises on the right of the trustee to an appeal to the Supreme Court from the decision of the Circuit Court of Appeals.

The trustee contends that he has such right under section 24a of the Bankruptcy Act which provides:

> "The Supreme Court of the United States . . . (is) hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases;"

and under Section 6 of the Court of Appeals Act of 189[illegible] which provides:

> "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

This conclusion that the right of appeal lies under the above quoted sections of the Bankruptcy Act and the Court of Appeals Act is arrived at by process of elimination, and a consideration of what the Supreme Court has said upon the subject.

Section 25a of the Bankruptcy Act provides that appeals, as in equity cases, may be taken in bankruptcy proceedings to the Circuit Courts of Appeals; (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt, (2) from a judgment granting or denying a discharge, and (3) from a judgment allowing or rejecting a claim of five hundred dollars or over.

It is apparent that the present is not a case involving the adjudging of any one a bankrupt, allowing or denying a discharge, or allowing or rejecting a claim. The appellee herein has made no application to the trustee to have its claim allowed.

Section 25b allows an appeal to the Supreme Court in certain cases from a final decision of the Circuit Court of Appeals allowing or rejecting a claim, but the section does not apply for the reason just given, that this case does not involve the allowance or rejection of a claim.

Referring now to the quotation from Section 6 of the Act of 1891, it appears that in cases not thereinbefore made final in the Circuit Court of Appeals, an appeal will lie as of right to the Supreme Court. The cases made final are those in which the jurisdiction depends on diverse citizen-

ship, cases arising under the patent, revenue and criminal laws, and in admiralty cases. It is obvious that the present case is not included in this last classification.

When this case was taken to the Circuit Court of Appeals some doubt arose in our minds as to whether the right of review was given by Section 24a providing for appeals in controversies arising in bankruptcy proceedings, or Section 24b which confers the right of superintendence and revision upon the Circuit Courts of Appeals in matters of law in the proceedings of the inferior courts of bankruptcy. Both methods of review were invoked by the trustee in bankruptcy, but it was held by the Circuit Court of Appeals, in denying our motion for a rehearing, that:

> "These are the cases in which judgments for the Head & Dowst Company were entered on January 3, 1911, 184 Fed. 409. This petition is entitled both in '*Hobbs, Trustee* v. *Head & Dowst Company*,' and in 'Nathaniel W. Hobbs, Trustee, Petitioner.' It is not necessary to notice the latter proceeding, because it was plainly dismissed for want of jurisdiction. The merits were disposed of in *Hobbs, Trustee, Appellant* v. *Head & Dowst Company, Appellee*."
>
> *Hobbs* v. *Head & Dowst Co.*, 185 Fed., 1006.

It is plain, therefore, that the Circuit Court of Appeals has already decided that the pending case is properly an appeal inolving "a controversy arising in bankruptcy proceedings" under Section 24a, and not properly a petition for review in the bankruptcy proceedings proper under Section 24b. If that court was right in treating the proceeding as an appeal under Section 24a, we have a clear and undoubted right to an appeal as of right to the United States Supreme Court.

Bankruptcy Act, Sec. 24a;
Court of Appeals Act, 1891, Sec. 6.

In the cases which we shall now submit to the court, it clearly appears that this Honorable Court has already adopted the rule that cases like the present are included under Section 24a, that an appeal will lie under said section to the Supreme Court, and that the circumstance that a petition to review has also been filed under Section 24b, will be treated as immaterial.

Remington Bankruptcy Supp., *s.* 2918.

In *Hewitt* v. *Berlin Machine Works*, 194 U. S., 296, the trustee in bankruptcy applied to the district court for an order of sale of certain real estate, buildings and machinery. Notice to creditors was given, and thereafter the Berlin Machine Works filed a petition to be declared the owner of certain machines included in the property, claiming a lien under a conditional sale (p. 300), and to be awarded the possession thereof or that it be determined that the corporation be first paid out of the proceeds of the sale of the machines and to share in dividends on any unpaid balance.

The referee held that the corporation had lost the legal title to the machines. The district court reversed the decision of the referee. The trustee then filed a petition to revise and also appealed to the Circuit Court of Appeals. The Circuit Court of Appeals affirmed the judgment of the district court and an appeal was then taken to the Supreme Court of the United States. In its consideration of the case that court said:

> "If the trustee had carried the case to the Circuit Court of Appeals, on petition for supervision and revision under Section 24b of the bankruptcy law, the case would have fallen within *Holden* v. *Stratton*, 191 U. S., 115, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession

of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under Section 24a exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, *Holden* v. *Stratton, supra,* while Section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by Section 2, to settle the estates of bankrupts and to determine controversies in relation thereto, *Hutchinson* v. *Otis,* 190 U. S., 552; *Burleigh* v. *Foreman,* 125 Fed., 217.

"The appeal to this court then followed under Section 6 of the Act of March 3, 1891.

"This brings us to a consideration of the case on the merits."

Hewit v. *Berlin Machine Works,* 194 U. S., 296, 299.

In *Knapp* v. *Milwaukee Trust Company,* 216 U. S., 545, the Standard Telephone and Electric Company was adjudicated a bankrupt in the District Court of the United States for the Eastern District of Wisconsin. The trustee in bankruptcy filed a petition to sell all the property of the bankrupt. Knapp, as trustee of certain mortgages given by the telephone company, intervened, and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question was as to the lien of the mortgages upon the fund. We quote that part of the opinion material to the present controversy:

"The trustee in bankruptcy answered the petition of Knapp, trustee under the mortgage, averring that it was

a chattel mortgage, and fraudulent and void as to creditors, because of certain agreements contained therein, because it was on after-acquired property, and because of the failure to file an affidavit of renewal as required by the Wisconsin statutes. The referee in bankruptcy found the facts, and held the mortgage void. Upon hearing the District Judge reached a like conclusion.

. . . "The Circuit Court of Appeals of the Seventh Circuit, holding the mortgage void for the reasons set forth at large in the opinion of the District Judge.

. . .

"A motion has been filed to dismiss the appeal for want of findings of fact and conclusions of law in the Circuit Court of Appeals, as required by General Order in Bankruptcy XXXVI. Whether or not such a finding of facts was required depends upon the character of the present proceeding. General Order in Bankruptcy XXXVI, authorized under subdivision b of Sec. 25 of the Bankruptcy Act, provides for appeals under the Act to this court from the Circuit Court of Appeals within thirty days after the judgment or decree, and for the making and filing of a finding of facts and conclusions of law separately stated, and that the record upon such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts and conclusions of law.

"Section 25b provides for appeals from any final decision of a Court of Appeals allowing or rejecting a claim under the Act, under such rules and within such time as may be prescribed by the Supreme Court of the United States. Such appeals are allowed when the amount in controversy exceeds the sum of $2,000, and the question involved might have been taken by appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the Bankruptcy Act throughout the United States.

"Under authority of subdivision b, Sec. 25, General Order XXXVI was adopted, and in the cases enumerated a finding of facts and conclusions of law must be made in the Circuit Court of Appeals and the appeal taken within thirty days after the entry of the judgment or decree.

"The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the Court of Appeals Act, Bankruptcy Act, Sec. 24a; *Hewit* v. *Berlin Machine Works*, 194 U. S., 296; *Coder* v. *Arts*, 213 U. S., 223, and cases therein cited.

"As the appeal was in the manner provided for in the Court of Appeals Act no special finding of facts was required under General Order XXXVI, and the motion to dismiss the appeal must be overruled."

Knapp v. *Milwaukee Trust Company*, 216 U. S., 545, 552, 553.

"It is . . . apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?

"A reference to the adjudications in this court may assist in clearing the matter. *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, is an illustration of a controversey arising in bankruptcy proceedings (24a) wherein the appeal is under Sec. 6 of the act of March 3, 1891. In that case the Berlin Machine Works asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under Sec. 6 of the act of March 3, 1891.

"We are thus brought to the determination of the question, Was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding, properly speaking, The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustee to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement: 'The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the cost, if any, of collecting payment thereof out of said property held as security.'

"He thus in effect presented to the trustee in bankruptcy a claim upon his notes, joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in *Hewit v. Berlin Machine Works, supra; York Manufacturing Company v. Cassell*, 201 U. S., 344; *Security Warehousing Co. v. Hand*, 206 U. S., 415, intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien

for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the bankruptcy act governing bankruptcy proceedings.

"It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee. This method of procedure was recognized in *Hutchinson* v. *Otis*, 190 U. S., 552. In that case Otis, Wilcox & Company, having a claim for $4,421.64 had sued and attached the bankrupt's property within four months of filing the petition in bankruptcy. Otis, Wilcox & Company, supposing their attachment good, took judgment by default and collected their debts from the attached parties, the trustee agreeing to save them harmless from liability; satisfaction was entered in each suit. Subsequently the trustee demanded payment of those debtors of the bankrupt, and, as they had no defence, Otis, Wilcox & Company paid to the trustee the amount of the debts. Otis, Wilcox & Company then filed a claim in bankruptcy, which was allowed in the lower court; and they asserted a lien upon the bankrupt estate. After disposing of the question of the effect of the satisfaction, and deciding that the claim was provable, speaking of the asserted lien this court said:

" 'Under the circumstances of this case it seems to us that the petition (asserting the lien) was incident to the claim, *Cunningham* v. *German Insurance Bank*, 101 Fed. Rep. 977; . . . and was a bankruptcy proceeding under section 2, cl. 7, within the meaning of Section 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not, 'a judgment allowing or rejecting a debt or claim of five hun-

dred dollars or over,' within Section 25a, 3, and was not an independent ground of appeal. . . .

"The contest in the Otis case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate."

Coder v. *Arts*, 213 U. S. 223, 233, 239.

"This is a bill in equity brought by a trustee in bankruptcy to set aside a transfer of accounts and bills receivable made by the bankrupt to the defendant Sugarman with intent to delay and defraud creditors. Sugarman pleaded in bar that the plaintiff had ratified his dealings, because, with knowledge of all the facts, the plaintiff had taken a judgment against the bankrupt for $17,500, a part, or all of which was money remaining in the bankrupt's hands of $30,000 alleged by the bill to have been paid to him by Sugarman in pursuance of the fraudulent scheme. A majority of the Circuit Court of Appeals held the ratification made out, on the ground that, to get the judgment, the trustee had to rely upon a right inconsistent with that now set up. 157 Fed. Rep. 669. The plaintiff appealed to this court.

"It is argued that the appeal is too late because not taken within thirty days after the decree, as required by General Orders in Bankruptcy No. 36, for appeals under the act. But this is not an appeal under the act, *s.* 25, by authority of which the General Order was adopted, and is not governed by that order. The appellate jurisdiction is under, or is the same as that under the Court of Appeals, Act of March 3, 1891, *c.* 517, *s.* 6 26 Stat. 828. *Knapp* v. *Milwaukee Trust Co.*, March 7, 1910, 216 U. S. 545. The appeal was taken within a year and was in time."

Thomas v. *Sugarman*, 218 U. S. 129, 133.

A summary of the facts in the preceding cases should aid the present discussion.

In the *Hewit* case the trustee applied for leave to sell certain property in his hands. Thereafter the Berlin Machine Works filed a petition asking to be declared owner of the

same, claiming a lien thereon. From the decision of the District Court the trustee appealed and also filed a petition to revise. The latter was treated as immaterial by the Supreme Court. An appeal was allowed by that court under section 6, of the Act of March 3, 1891, the court holding that the intervention of the Berlin Machine Works raised a distinct and separable issue and was a controversy within the meaning of Section 24a.

The *Knapp* case is similar to the *Hewit* case. The trustee filed a petition to be allowed to sell all the bankrupt's property. Knapp as trustee of certain mortgages given by the bankrupt, intervened and asked to have the lien of the mortgages established as the first lien on the property. The Supreme Court held this to be a controversy within the meaning of Section 24a, and appealable under Section 6 of the Act of March 3, 1891.

Coder v. *Arts* differs materially from the last two mentioned cases. Arts there presented his claim in due form, simply setting forth the fact that he held a mortgage as security for the payment of the same. He did not assert a title independent and superior to that of the trustee, but recognized the right of the bankruptcy court over the property, and asked to have his claim given priority. He instituted a proceeding in bankruptcy and the case did not come under the class specified in Section 24a.

But the case of *Thomas* v. *Sugarman* falls within that class. There the trustee brought a bill in equity to set aside fraudulent transfers and the defendant questioned his right to maintain his bill by reason of election and claimed the property adversely. The case went to the Circuit Court of Appeals on appeal from the District Court and was properly appealable from that court under Section 6 of the Act of March 3, 1891.

To review the proceeding in the present case. The first

move in the litigation was made by the Head & Dowst Company which brought suit in the state court to foreclose an alleged mechanic's lien. Attachment of the property in this suit was made within the four months previous to the filing of the petition to have the New England Breeders' Club adjudicated a bankrupt. There was danger of the trustee losing possession of the property in the proceeding in the state court, so a petition was filed by him April 14, 1908, seeking an injunction to restrain the defendant from proceeding there, and a temporary restraining order which was granted. The defendant entered its appearance specially and filed a petition June 11, 1908, asking to have the injunction dissolved, setting forth the fact of attachment in the state court and the proceedings incident thereto. It also alleged that the club was not one entitled to the benefit of the bankruptcy act and denied the District Court's jurisdiction. June 10, 1908, the trustee had also filed a petition to compel the defendant to adjudicate its adverse claim. February 18, 1909, in another proceeding [*In re New England Breeders' Club*, 169 Fed. (C. C. A. 1st Cir.) 586] it having been determined that the Club was entitled to be administered a bankrupt, the defendant here filed its answer March 18, 1909, to the trustee's petition to stay the suit pending in the state court. Therein it again set forth the proceedings in the state court, denied the fraudulent transfer alleged in the trustee's petition, denied the right of the District Court to stay the proceedings of the Head & Dowst Company in the State Court, and stated that it had never filed or proved any claim against the Club in the bankruptcy proceedings.

The District Court thereafter appointed a master to hear all the evidence relative to the petitions filed June 10, and June 11, 1908, the petition of trustee to adjudicate adverse claim, and of the defendant to dissolve the injunction, and

ordered the Head & Dowst Company to go forward upon the question of the validity of its alleged lien. The defendant excepted to this order as it had never appeared upon the petition to adjudicate its adverse claim. The evidence was thereafter fully presented to the Master, both as to the proceedings in the State Court and the facts surrounding the alleged lien. Upon consideration of the master's report the District Court decided that justice had been done, accepted the finding of the State Court that the lien was valid and dismissed the case, although deciding that the federal court had jurisdiction if it wished to exercise it to pass upon the merits of the defendant's claim of lien (175 Fed., 501, 504). An appeal was then taken to this court under Section 24a.

Now let us compare the present case with those cited. It has some of the characteristics of each. It is similar to *Thomas* v. *Sugarman*, in that the trustee filed the petition alleging fraud and connivance on the part of the defendant. It resembles the *Hewit* and *Knapp* cases because the defendant is asserting a claim to the property adverse to the trustee, and if upheld will result in the property passing entirely out of the hands of the trustee and out of the jurisdiction of the District Court. This case is similar to *Coder* v. *Arts* simply in that a lien is claimed, but it differs essentially because here no claim has been filed or proved by the defendant against the bankrupt estate. Its whole attitude is one denying the right of the trustee to handle the property as part of the bankrupt estate. Its position is an assertion of title to the property in the possession of the trustee, raising a distinct and separable issue as to the title of such property. This is not a contest over a lien incident to a claim proved against the bankrupt estate, for no claim has been proved or filed. It is a contest over the validity of a mechanic's lien, the determination of which will show

to whom the property belongs, the Dowst Company, or the trustee, to be administered as part of the bankrupt estate.

For these reasons the present appeal will lie as of right to the Supreme Court under Section 6 of the Act of March 3, 1891.

HENRY F. HOLLIS,
Of Counsel for Nathaniel W. Hobbs,
Trustee, Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 148.

NATHANIEL W. HOBBS, TRUSTEE, APPELLANT,

vs.

HEAD & DOWST COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF APPELLANT ON MOTION TO DISMISS.

Reasons Against Motion.

Upon oral argument we shall show that:

1. The officer of the Federal court (appellant) is in possession of real estate belonging to the bankrupt estate of the New England Breeders' Club:

2. That it is sought in this proceeding to wrest from the Federal court the real estate which that court holds for the benefit of the general creditors and bestow it upon the Head & Dowst Company (appellee) as a preferred creditor:

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No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

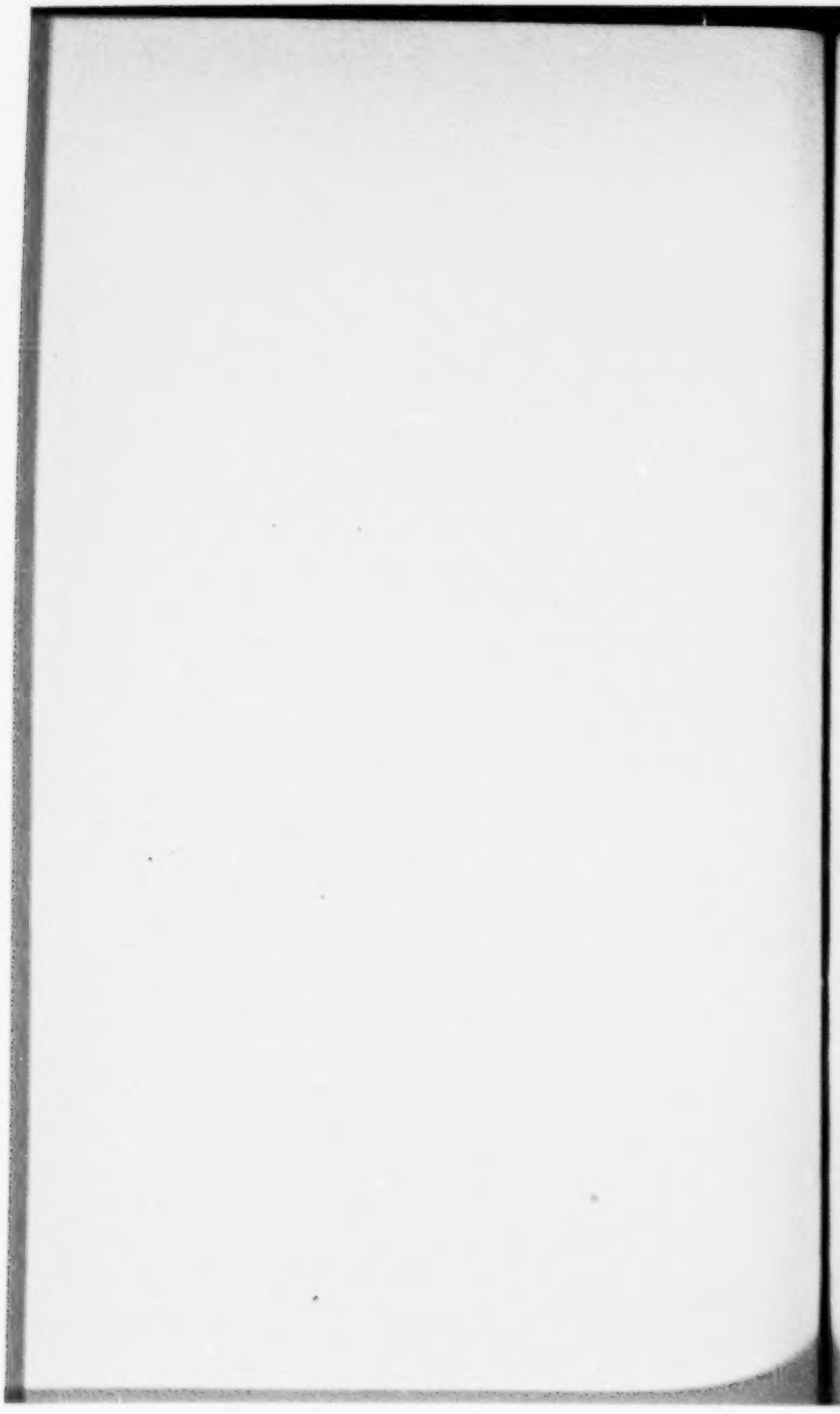
NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS FOR WANT OF JURISDICTION.



No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Head & Dowst Company, Appellee, respectfully moves the court to dismiss the appeal in this case and assigns therefor the following reasons:

1. The Circuit Court of Appeals had no jurisdiction of the case on its merits, hence its decision cannot found an appeal to this court.

2. The appeal from the Circuit Court of Appeals was not taken within the thirty days prescribed by Rule XXXVI of the General Orders and Forms in Bankruptcy nor do any specific findings of fact and conclusions of law accompany this appeal as therein specified.

In support of this motion the following argument is submitted:

BRIEF STATEMENT OF CASE.

This case relates to a mechanic's lien claimed under the statutes of New Hampshire on the real estate of the New England Breeder's Club, appellant, (hereinafter referred to as the Club) now in bankruptcy. Head & Dowst Company (hereinafter referred to as the Company), appellee and lienor, constructed grandstands, stables and buildings of the Club for the contract price of $205,893.02. The Company had fully completed this contract except for the addition of certain shutters, etc., amounting in value of labor and materials to about one thousand dollars. At this stage the insolvency of the Club and its refusal and inability to make certain payments then due on the contract, compelled the Company to cease further operations. To this cessation the Club assented. *Record, pp.* 30, 70.

(*a*) December 24, 1906, the Company brought this action in the State courts to enforce its statutory lien, by attaching the real estate of the Club. April 19, 1907, the Club was petitioned into bankruptcy and December 31, 1907, was adjudged a bankrupt. Meanwhile the Company's action had been tried in the State Superior Court and the Company was awarded judgment *in rem,* for $46,748.08, the case being defended by the Assignee in insolvency who subsequently was appointed Trustee in bankruptcy. *Record, pp.* 13, 14, 32. The Assignee's exceptions to the verdict were overruled in the State Supreme Court, where he, as Trustee, declined to appear. Instead, he petitioned the District Court independently to adjudicate the lien question. Then the District Court enjoined the Company from further prosecuting its suit in the State court and referred the lien question to a Master. *Record, pp.* 4, 5, 11.

His report sustained all the Company's contentions and recommended dissolution of the restraining order. *Record, p.* 44. The District Court, however, directed the Trustee to obtain a hearing in the State Supreme Court on the exceptions which had been abandoned. *Record, p.* 50. This was granted, and after argument, the exceptions to the verdict were formally overruled, March 1, 1910. *Record, p.* 51.

(*b*) Thereupon the District Court, with the Master's report before him, accepted "the result reached in the State Court as sufficiently establishing the amount and validity" of the lien and dismissed the Trustee's petition to adjudicate independently the lien question. *Record, p.* 58. The Trustee took the case to the Circuit Court of Appeals, both by petition to revise and by appeal; but the petition was dismissed and the decree of the District Court on the appeal was affirmed. *Record, p.* 71. Then followed the present appeal.

I.

The Judgment of the State Court, Rendered Prior to the Adjudication of Bankruptcy, was Substantially Binding on the District Court; so that the Circuit Court of Appeals had no Jurisdiction Whereby to Determine the Lien Question on its Merits, and thereby Found a Right of Appeal.

The Company's claim to a lien on the property is based upon the provisions of Chapter 141 of the Public Statutes of New Hampshire, the material parts of which are as follows:

"Sec. 10. If a person shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, for erecting, alter-

ing or repairing a house or other buildings, or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien thereon and on any right of the owner to the lot of land on which the house, building or appurtenances stand."

"Sec. 16. The lien created by section ten (etc.) shall continue for ninety days after the services are performed, or the materials or supplies are furnished, unless (etc.)"

"Sec. 17. Any such lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose."

In accordance with the provisions of this statute, the Company made its lien attachment on December 24, 1906; at that time the Club was legally a "going" concern; neither State insolvency proceedings nor the petition in bankruptcy came to pass until nearly four months later. *At the time the State court awarded judgment for the Company in this action, the Club had not been decreed a bankrupt.* The suit was defended by the Assignee in insolvency (who was later the Trustee in bankruptcy) and a full, complete and impartial trial was had. *Record, p.* 33. So the State court, then unhampered by any restraining order of the District Court, with the proper parties before it and with jurisdiction over the real estate under the lien attachment, applied the local law to a local question and rendered judgment on the merits of the case.

(*a*) As a consequence of these proceedings when the Trustee took the real estate of the Club it was cumbered with the judgment of the State court in the lien suit; that judgment the District Court, under the facts of the case, could not question on its merits; in other words, the Trustee took the

property in the plight in which he found it, bound by the State court's judgment in the premises.

Zartman v. *First Nat. Bank,* 216 U. S. 134.
York Mfg. Co. v. *Cassell,* 201 U. S. 344.
Humphrey v. *Tatman,* 198 U. S. 91.
Hewit v. *Berlin Mach. Works,* 194 U. S. 296.
Eyster v. *Gaff,* 91 U. S. 521.
In re Vastbinder, 132 Fed. 718.
Linstroth Wagon Co. v. *Ballew,* 149 Fed. 966.
In re Baughman, 138 Fed. 742.
In re New York Economical Printing Co., 110 Fed. 514.
Clark v. *Snelling,* 205 Fed. 240.
In re Platteville Foundry & Machine Co., 147 Fed. 828.

In *Thompson* v. *Fairbanks,* 196 U. S. 516, at page 526 is said: "Under the present bankrupt act the trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

It cannot be contended that the lien acquired by operation of the builder's contract, and perfected by the attachment in accordance with the State statute before quoted, was void or was dissolved by any provision of the bankruptcy act. This is settled by *Henderson* v. *Mayer,* 225 U. S. 631, wherein the court says: "But the statute was not intended to lessen rights which already existed, nor to defeat

those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.

"Liens in favor of laborers, mechanics, and contractors are of this character, and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings' even when it is necessary to enforce them by some form of legal proceeding," *p.* 637.

On the contrary this lien falls within the scope of § 67 *d* which provided: "Liens given or accepted in good faith, and not in fraud upon this Act, and for a present consideration * * shall not be affected by this Act."

Remington, referring to a mechanic's lien, says:

"It is essentially and clearly a lien arising upon a presently passing consideration, and must be assumed to have been in the contemplation of the parties engaged in the work both as owners and contractors. Therefore, such a lien is one given and accepted upon a present consideration, and is within the meaning of clause (*d*) of Sec. 67, and is not a preference nor a lien obtained by legal proceedings."

2 Remington on Bankruptcy, 681.

The Master's report expressly negatives the giving of any preference by Mr. Miller, the agent of the Club, or any fraud by anyone connected with the case. *Record, p.* 44. Unless fraud appear the lien encumbrance is not one created by the act of the debtor, (Bankruptcy Act § 67 *e*), but rather by the lien statute. *In re Emslie,* 102 Fed. 291, 293.

It follows that the Superior Court of New Hampshire rightfully undertook original jurisdiction

of this lien question, and, having the proper parties before it, (*Record, p.* 68) proceeded to render judgment for the Company before the Club was adjudicated a bankrupt. Even if the plight of the bankrupt's property is determined by its status as of the date of the petition in bankruptcy, none the less the State court was adjudicating by virtue of an attachment undissolved and unimpaired, because the attachment lien was preserved rather than denounced by the bankruptcy act. Furthermore, of course, this judgment was rendered before any restraining or supervisory process or order had issued from the bankruptcy court. Not only did the State court have jurisdiction of the parties, and the property (although it may not have had actual *possession* of the latter), but it was adjudicating a question peculiarly within its sphere, that is, the validity of a lien under the statute law of the State. The decisions of the State tribunals on such questions are held controlling.

Eyster v. *Gaff*, 91 U. S. 521.
Knapp v. *Milwaukee Trust Co.*, 216 U. S. 545.
Thompson v. *Fairbanks*, 196 U. S. 516.
In re Grissler, 136 Fed. 754, 756.
Etheridge v. *Sperry*, 139 U. S. 266.
Phelps v. *Mut. Res. Fund Life Assn.*, 112 Fed. 453, 464.
In re Beede, 138 Fed. 441, 444.
In re Scruggs, 205 Fed 673.
In re United States Lumber Co., 206 Fed. 236, 238.
1 Loveland on Bankruptcy, *p.* 945.

Here not only is the law of New Hampshire settled under the statute in issue but is settled in the

very case at bar, on these same facts which the Trustee petitioned the District Court independently to adjudicate. There can be no dispute as to the law of New Hampshire for it has been determined in this very case, in a suit defended by the same party who is now the Trustee in bankruptcy. This controversy had been determined on its merits by the New Hampshire courts and if there is any virtue in the proposition that liens dependent upon local statutes are to be decided by the law as determined by the courts of the State, there was no field for the exercise of meritorious adjudication by either the District Court or the Circuit Court of Appeals. Hence when the latter court did essay to determine the lien question on its merits, the Company was injured, for although the decision of the court was entirely favorable to the Company, an appeal to this court was allowed, as the Appellee contends, erroneously.

(*b*) But herein another well established principle of law has equal application, namely, that where two courts have concurrent jurisdiction of the subject of an action, the one which first obtains jurisdiction of the controversy has the right to proceed to its final determination without interference from the other.

Peck v. *Jenness,* 7 How. 612.
Pickens v. *Roy,* 187 U. S. 177.
Metcalf v. *Barker,* 187 U. S. 165.
In re Rohrer, 177 Fed. 381.
Westfeldt v. *No. Car. Mining Co.*, 166 Fed. 706.
In re Gerdes, 102 Fed. 318.
Kimberly v. *Hartly,* 1 Fed. 571.

Such rule is not limited to cases in which the

court first obtaining jurisdiction has taken actual or constructive possession of the subject matter of the suit.

Westfeldt v. *No. Car. Mining Co.*, 166 Fed. 706.
Gates v. *Bucki*, 53 Fed. 961.
Vowinckel v. *N. Clark & Sons*, 162 Fed. 991.
Phelps v. *Mutual Reserve Fund Life Ass'n*, 112 Fed. 453.
Pitt v. *Rogers*, 104 Fed. 387.
Davis v. *Planters' Trust Co.*, 196 Fed. 970.
Bradley v. *United Wireless Telegraph Co.*, 79 N. J. Eq. 458.
Farmers' Loan & T. Co. v. *Lake Street Elevated R. Co.*, 177 U. S. 51.

In the latter case it is said at *p.* 61:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. *Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 How. 450; *Moran* v. *Sturges*, 154 U. S. 256; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432; *Harkrader* v. *Wadley*, 172 U. S. 148."

"And this rule, in its application to federal and state courts, being the outgrowth of necessity 'is a principle of right and law' which leaves nothing to

the discretion of a court, and may not be varied to suit the convenience of litigants."

Merritt v. *American Steel Barge Co.*, 79 Fed. 228, 231, and cases there cited.

The State court was proceeding to adjudicate under a mesne attachment; it gave judgment *in rem* to the Company for its lien claim. While the court did not have actual possession of the land, it had jurisdiction of both parties and its process of attachment put the land *in custodia legis*. The action in the State court required the control and dominion of the property involved. The levying of judgment would eliminate the title of the Club.

Davenport v. *Tilton*, 51 Mass. 320.
Kittredge v. *Warren*, 14 N. H. 509.
Palmer v. *Texas*, 212 U. S. 118.
Heidritter v. *Oil Cloth Co.*, 112 U. S. 305.

The determinative factor is the meaning of "possession," "custody," "control" or "dominion" as applied to the court attempting to exercise jurisdiction. In the case at bar the State court was proceeding to exercise jurisdiction under an attachment made almost four months before the date of the petition in bankruptcy; that attachment was not dissolved by the bankruptcy act, and by virtue of service on the Club and this attachment of its real estate the State court gave judgment *in rem* against the real estate *before* the adjudication in bankruptcy. The execution of that judgment against the real estate under the still puissant attachment would extinguish the Club's title to the land. It follows that the attachment although not giving the State court actual possession at the time, brought the property into the ultimate control of the State court, truly *in custodia legis*, and the equivalent to actual possession.

Cases in the Federal courts apparently opposed to the contention here, will doubtless be cited in the Trustee's brief to be filed, but upon scrutiny it is safe to assert that most of them will be examples of either (1) where the property was in the prior custody of the Federal courts, or (2) where the attachment itself under which the State court was attempting to exercise jurisdiction, was dissolved by the bankruptcy act so the jurisdiction was lost together with the attachment. The facts of the instant case are, however, distinctly otherwise.

It is true the District Court had a clear right to examine into the proceedings to determine if they were regular and perhaps, in accordance with fundamental rules as to litigated questions, (*Record, p.* 65). It also had undoubted power to inquire into the situation in order to determine questions of jurisdiction. *First National Bank* v. *Chicago Title & Trust Co.,* 198 U. S. 280; *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Mueller* v. *Nugent,* 184 U. S. 1; *Schueer* v. *Brown,* 195 U. S. 171; *Linstroth Wagon Co.* v. *Ballew,* 149 Fed. 960; *Shea* v. *Lewis,* 206 Fed. 877; *In re Baird,* 116 Fed. 765; *In re Kane,* 131 Fed. 386; *In re Rathman,* 183 Fed. 913. This the District Court did, and after due consideration of the proceedings as determined by the Master's report, *it accepted the* judgment of the State courts as conclusive (*Record, pp.* 58, 65) and properly dismissed the Trustee's petition to independently adjudicate the lien question further.

Further than this the District Court and the Circuit Court of Appeals had no jurisdiction. The Company, proceeding in the State courts before the inception of bankruptcy proceedings, by virtue of its lien attachment, which for jurisdictional purposes was equivalent to actual possession of the land, was

an *adverse claimant* as much as a claimant of absolute title, within the meaning of section 23 of the Bankruptcy Act. *Jaquith* v. *Rowley*, 188 U. S. 620; *Harris* v. *First National Bank*, 216 U. S. 382; *Frank* v. *Volkommer*, 205 U. S. 521; *In re Mimms & Parham*, 193 Fed. 276; *In re Rathman*, 183 Fed. 913.

The Company has never filed a claim in the bankruptcy court; it has never appeared voluntarily in the Federal courts; a discharge in bankruptcy would not operate as a release of this lien claim. It follows that the District Court might not properly stay these proceedings in the State courts. Power vested by section 11a of the Bankruptcy Act to stay a suit founded upon a claim from which a discharge would be a release, is not applicable to a proceeding *in rem* where the State court has acquired an indefeasible jurisdiction; the Trustee's only remedy in such cases is by plenary proceeding in the State courts.

Louisville Trust Co. v. *Comingor*, 184 U. S. 18.
First Nat. Bank v. *Chicago Title & T. Co.*, 198 U. S. 280.
Bardes v. *Hawarden Bank*, 178 U. S. 524.
Babbitt v. *Dutcher*, 216 U. S. 102.
Tennessee Marble Producer Co. v. *Grant*, 135 Fed. 322.
In re Rohrer, 177 Fed. 381.
In re Wagner's Estate, 206 Fed. 364.
In re Mimms & Parham, 193 Fed. 276.
Shea v. *Lewis*, 206 Fed. 139.
In re Henderson, 206 Fed. 139.
In re Grissler, 136 Fed. 754.
In re Kane, 152 Fed. 587.
1 Loveland on Bankruptcy, *p.* 159.

The Trustee had his day in the State courts on the questions of merit at issue in this case, when the District Judge instructed him to try out the exceptions to the judgment of the Superior Court, taken by him as Assignee in insolvency and abandoned by him as Trustee in bankruptcy.

When the Trustee took an appeal, the District Court reserved to the Circuit Court of Appeals such discretion as it had in the premises. Perhaps it had such power. But when the Circuit Court of Appeals undertook to determine the lien *question on its merits*, it is respectfully submitted, that court exceeded its jurisdiction; and although the decision was in accord with that of the State court, and the District Court, the effect of the meritorious decision was to bottom an appeal to this court. Accordingly this appeal should be dismissed, in accordance with the Company's motion to that effect.

II.

The Case Presents a Proceeding in Bankruptcy rather than a Controversy Arising in Bankruptcy Proceedings.

The test to determine this proposition depends upon the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. *Coder* v. *Arts*, 213 U. S. 223; *In re Jungman*, 186 Fed. 302. This proceeding was initiated by the Trustee in bankruptcy who petitioned the District Court to stay further proceedings in the State courts and to adjudicate independently of those courts, the lien of the Company in order that the estate of the bankrupt might be properly administered and the real estate sold. *Record, pp.* 1, 2, 5, 6.

Thereby he instituted a proceeding in bankruptcy, looking to reducing the estate to money, marshalling the assets and determining the encumbrances upon the real estate of the bankrupt. *Hutchinson* v. *Otis*, 190 U. S. 552. Its result has been a practical retrial of the lien question in the Federal courts against the objection of the Company. The latter has not disputed with the Trustee the title to the property or his possession of it. On the contrary it has always recognized both title and possession as being in the Trustee and has merely sought to prove its lien claim under its attachment. It did not, as was the case in *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, and *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, intervene in the bankruptcy proceedings and assert an independent and superior title to the Trustee's. It was dragged into the bankruptcy forum and the validity of its claim against the bankrupt's property was determined without its assent, although in its favor.

If the *manner* in which the jurisdiction of the bankruptcy court was invoked is the determining characteristic of a proceeding in bankruptcy (*Coder* v. *Arts*, 213 U. S. 223) surely exercising the jurisdiction by summary procedure, — by restraining further action in the State courts, and by referring all the facts relating to the lien question to a Master and acting upon the latter's report — is a typical example of a proceeding in bankruptcy. An action begun by summary process is not ordinarily "a controversy in bankruptcy." *In re Rathman*, 183 Fed. 913, 918.

The determination of lien questions, involved in the marshalling of assets and the clearing of en-

cumbrances from the bankrupt's property, is normally peculiar and incidental to proceedings in bankruptcy.

Coder v. *Arts*, 213 U. S. 223.
Whitney v. *Wenman*, 198 U. S. 539.
First Nat. Bank v. *Chi. Title & Trust Co.*, 198 U. S. 280.
In re Lee, 182 Fed. 579.
In re Farrell, 176 Fed. 505.
In re McMahon, 147 Fed. 684.
In re Streator Metal Stamping Co., 205 Fed. 280.
Morgan v. *First Nat. Bank*, 145 Fed. 466.
In re Kellogg, 121 Fed. 333.
1 Loveland (4th ed.) *p.* 91.

Here the Company was compelled to litigate its lien, the same as if it had filed a claim against the bankrupt estate as in *Coder* v. *Arts* above; it claimed no specific property, it merely asked payment of a debt the owing of which is not disputed. The lien was but an incident of the debt as the *Coder* case holds. The case could not have arisen in the District Court apart from bankruptcy because there was no diversity of citizenship or other element necessary to give Federal jurisdiction. The Trustee took the case to the Circuit Court of Appeals both by petition to review under 24 b of the Bankruptcy Act and by appeal. The former was dismissed for want of jurisdiction. *Record pp.* 71, 76. This, it is submitted, was error. The appeal was adjudicated on its merits which also, it is submitted, was error. The appeal to this Court was not taken within thirty days of the judgment in the Circuit Court of Appeals (Rule 36), and hence must fail.

SUMMARY.

Apparently no other reported case presents the precise situation of the one at bar. Here is a case where a lien attachment is made, before the petition in bankruptcy; where trial is had in the State court, and judgment *in rem* ordered for the lienor before the adjudication in bankruptcy; where, thereafter, the District Court, in bankruptcy, restrains the further prosecution of the action in the State courts, determines the facts of the lien question through a Master; where the District Court thereupon adopts as conclusive the result in the State court, after sending the Trustee (who had defended the suit as Assignee in the State court) back into the State courts to argue the exceptions (claimed as Assignee in insolvency and abandoned as Trustee in bankruptcy) taken during the course of the trial; where the District Court dismisses the petition to independently adjudicate the lien question further than to accept the result reached in the State courts; where the Trustee then takes his matter to the Circuit Court of Appeals both by petition to revise and by appeal, and finally where that court dismisses both appellate proceedings, the former for want of jurisdiction and the latter after judgment on its merits, and then allows an appeal to this court under the Judiciary Act of 1891, Sec. 6; and during all this time the Company, lienor, has filed no claim in bankruptcy and has consistently and persistently objected to the exercise of the Federal jurisdiction over it; and yet every step in this litigation in the State trial court, before the Federal Master, the State Supreme Court, the opinion of the District Court, the decision of the Circuit Court of Appeals and a supplementary opinion on the motion for a rehearing has marked a decision favorable to the lienor, sustaining completely

its claim to a valid lien on the merits of the cause.

This exposition of the trial history of the case at bar would seem to suggest an error in the exercise of jurisdiction somewhere along the line. The State court, "was careful at the crucial stage of the proceedings to have before it parties who * * in a broad sense are the same as now before us" and did not proceed "against common right, or in violation of the fundamental rules of law" (*Per* Putnam J. in the Circuit Court of Appeals). *Record, p.* 68. *Cf.* also *Record, p.* 66. The attachment by which it acquired jurisdiction of the *res* was not impaired by the bankruptcy act. *It must follow then, of necessity, either (1) that the jurisdiction of the State court had attached indefeasibly (Peck* v. *Jenness,* 7 How. 612) because although the State court did not acquire actual *possession* of the *res* the property was *in custodia legis* for, on levy of execution by virtue of the unimpaired attachment, the title of the bankrupt would be extinguished, or (2) that the judgment was transferred to the jurisdiction of the Federal Court as an established lien on the property, subject only to a general supervisory consideration, (*Linstroth Wagon Co.* v. *Ballew,* 149 Fed. 960) or (3) the effect of the proceedings in the District Court was to set up a "proceeding in bankruptcy" from which no appeal lay to the Circuit Court of Appeals.

In any one of these situations, it is respectfully submitted, an appeal to this court was improperly allowed and the case should be dismissed for want of jurisdiction.

ROBERT L. MANNING, *of Counsel,*
appearing specially for
HEAD & DOWST COMPANY, *Appellee.*

Nov. 28, 1913.

Office Supreme Court, U. S.
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No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS.

THE NUTFIELD PRESS, MANCHESTER, N. H.

No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS.

Appellee, Head & Dowst Company, moves the court to dismiss the appeal in this case.

REASONS FOR MOTION.

The successive decisions of the State Court, of the District Court and of the Circuit Court of Appeals (including an opinion on a motion for rehearing) "proceeded on well settled principles of general law," (*Chapman* v. *Bowen*, 207 U. S. 89) and dealt with the same questions here sought to be raised. This appeal, it is submitted, was taken solely for the purpose of delay and is based upon a proposition which justifies no further argument. The law of the case was determined in *Rochm* v. *Horst*, 178 U. S. 1, and in the decision of the Supreme Court of New Hampshire reported in 75 N. H. 449, on these identical facts between these same parties.

STATEMENT OF CASE.

This case relates to a mechanic's lien claimed under the statutes of New Hampshire on the real estate of the New England Breeder's Club, now in bankruptcy. Head & Dowst Company, appellee and lienor, constructed grandstands, stables and buildings of the Club for the contract price of $205,893.02. The Company had fully completed this contract except for the addition of certain shutters, etc., amounting in value of labor and materials to about one thousand dollars. At this stage the insolvency of the Club and its refusal and inability to make certain payments then due on the contract, compelled the Company to cease further operations. To this cessation the Club assented.

(*a*) December 24, 1906, the Company brought this action in the State courts to enforce its statutory lien, by attaching the real estate of the Club. April 19, 1907, the Club was petitioned into bankruptcy and December 31, 1907, was adjudged a bankrupt. Meanwhile the Company's action had been tried in the Superior Court. The Company was awarded judgment *in rem*, for $46,748.08, the case being defended by the Assignee in insolvency who subsequently was appointed Trustee in bankruptcy. The Assignee's exceptions to the verdict were overruled, he as Trustee, declining to appear. Instead, he petitioned the District Court independently to adjudicate the lien question. Then the District Court enjoined the Company from further prosecuting its suit in the State court and referred the lien question to a Master. His report sustained all the Company's contentions and recommended dissolution of the restraining order. The District Court, however, directed the Trustee to obtain a hearing in the State Supreme Court on the exceptions which had been

abandoned. This was granted, and after argument, the exceptions to the verdict were formally overruled, March 1, 1910.

(*b*) Thereupon the District Court, with the Master's report before him, accepted "the result reached in the State Court as sufficiently establishing the amount and validity" of the lien and dismissed the Trustee's petition. The Trustee appealed to the Circuit Court of Appeals but his appeal was dismissed, and the decree of the District Court was affirmed. Then followed the present appeal.

ARGUMENT.

The only question now open is the same that has been decided adversely to the Trustee by three different tribunals (as well as in a Master's report) viz: (1) the State Superior Court, (2) the United States District Court and (3) the Circuit Court of Appeals,—which also filed an additional opinion on the same question, on the motion for rehearing.

The appellant's proposition is just this: that because the Company did not complete the contract in its entirety, *after the Club had become insolvent and itself had breached and abandoned the contract*, the Company cannot maintain any lien for the work actually done, even *although this amount represented a practical completion of the contract.*

It is submitted that this proposition, under the circumstances of the case, at least, is frivolous.

1. The State Court had original jurisdiction; it had these parties before it; it applied the local law—the lien statute of the State—to the facts of the case; the lien attachment was preserved, not dissolved, by the bankruptcy act; the decision of the State Court should be decisive; the District Court properly accepted "the result reached in the

State Court as sufficiently establishing the amount and validity" of the lien.

"The consequence is that in any event the Head & Dowst Company was entitled to proceed to enforce its lien for the balance due it,—and that in any view the adjudication of the State courts with reference to this, which is the substantial question in the case, cannot be disturbed." Putnam, J. Opinion in the Circuit Court of Appeals. Record, *p.* 71.

2. It is the law in New Hampshire (***Bank Commissioners*** v. ***Trust Co.***, 69 N. H. 621, 623) as it is elsewhere (***Anvil Mining Co.*** v. ***Humble***, 153 U. S. 540) that upon breach of an executory contract by one party thereto the other may cease performance and sue upon the contract. *"This rule is so fundamental as to dispose of the merits of these proceedings in any possible view that can be taken of them, or of what occurred in the courts of New Hampshire."* [Italics ours.] Putnam, J., on the motion for a rehearing in the Circuit Court of Appeals. Record, *p.* 76.

That the plaintiff lienor in such a case is not entitled to perfect his lien unless he complete *in toto* the contract which has been breached by the insolvency of the other party—that is, in a case of insolvency unless he increase the existing indebtedness to the full amount of the contract price,—runs as counter to the principles of justice and common sense as it is contrary to the law of the land.

It is respectfully submitted that the appeal should be dismissed.

ROBERT L. MANNING, *of Counsel,*
appearing specially for
HEAD & DOWST COMPANY, *Appellee.*

Sept. 22, 1913.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 148.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Brief for Head & Dowst Company

by

ROBERT L. MANNING
of Counsel.

No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Brief for Head & Dowst Company.

The facts in the case at bar have been determined in the State courts, and also, in the Federal forum, by a Master, by the District Court and by the Circuit Court of Appeals. These several tribunals are in complete accord upon every issue of fact and law raised in the proceedings relative to the lien. Their findings sustain every contention of the Head & Dowst Company, Appellee, hereinafter referred to as the Company. "It (*i. e.* the State Supreme Court) did, however, hold that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the Superior Court." Putnam, J. in the Circuit Court of Appeals, *Record, p.* 65. The correctness of these conclusions of fact cannot successfully be questioned further in this court.

In *Page* v. *Rogers*, 211 U. S. 575, Mr. Justice Moody says, *page* 577,

> But the rule is well established that where two courts have concurred in findings of facts in equity, this court will accept those findings, unless clear error is shown. *Dun* v. *Lumberman's Credit Asso.*, 209 U. S. 20.

United States v. *Clark*, 200 U.S. 601, 608.
United States v. *Stinson*, 197 U. S. 200, 207.
Oceanic Steam Nav. Co. v. *Aitken*, 196 U. S. 589, 595.
Illinois ex rel. Hunt v. *Illinois C. R. Co.*, 184 U. S. 77, 98.

In *Furrer* v. *Ferris*, 145 U. S. 132, Mr. Justice Brewer says:

> The cause was referred to a master to take testimony therein 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *State Bank*, 141 U. S. 107.
>
> *Furrer* v. *Ferris*, 145 U. S. 132, 134.

Again, to quote this Court:

> Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the court of appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two

courts upon a question of fact will be followed, unless shown to be clearly erroneous. *The Carib Prince,* 170 U.S. 655, 658, *sub nom. Wuppermann* v. *The Carib Prince,* and cases there cited.

Brainard v. *Buck,* 184 U. S. 99, 104.

Schwartz v. *Duss,* 187 U. S. 8, 26.

Hy-Yu-Tse-Mil-Kin v. *Smith,* 194 U. S. 401, 412.

There was ample evidence to sustain the following conclusions by the several tribunals, which are here material.

1. The contract price for the construction of the grand stands, stables, etc., was $205,893.02. The Company had earned all but $1000. of this sum, for some shutters, when the insolvency of the New England Breeders' Club, Appellant (hereinafter referred to as the Club), and its refusal and inability to make certain payments then due upon the contract compelled the Company to cease further operations. To this cessation the Club assented and abandoned the contract. *Record, pp.* 30, 31, 62, 70.

2. Miller, president of the Club, was for the purposes of the case, practically the corporation; "it is apparent that the entire subject matter of the work contracted for by the Head & Dowst Company had by acquiescence, come under his sole charge." *Record, p.* 69.

If any question of law is now open it is that already presented to the State courts, the District Court and the Circuit Court of Appeals (*Record, pp.* 69, 71), namely whether a contractor who has already executed all but one thousand dollars' worth of work on a $205,893 undertaking, must complete the contract in its entirety in order to claim a builder's lien when at that stage the other party has become bankrupt, abandoned the contract, declined to pay the balance due of $45,995, and informed the contractor he must look to his lien for satisfaction.

The State courts have determined the question in favor of the Company, the lienor. As it is a well established doctrine that the decisions of the State courts construing their lien statutes are controlling on the Federal Courts (Company's Brief on Motion to Dismiss for Want of Jurisdiction, *p.* 7), it would seem that the question were already determined,—"that in any view the adjudication of the State courts with reference to this, which is the substantial question in the case, cannot be disturbed." Putnam, J., in the Circuit Court of Appeals, *Record, p.* 71. Hence the Company raised the question of jurisdiction by its motion and the accompanying brief.

ARGUMENT.

The action of the Company to enforce its lien claim was based upon the original contract. *Record, pp.* 32, 62. The Company is entitled to its judgment *in rem* against the real estate it specifically attached in accordance with the requirement of the New Hampshire statute, because,

1. It substantially completed the contract.
2. The Club breached the contract by refusing to pay instalments due and payable under the contract, and by reason of its insolvency and abandonment of the contract, justified the Company's action.
3. The Club waived absolute completion.

1. The Contract was Substantially Completed.

The contract price, including additions, for constructing the grandstands, stables, buildings, fences, etc., was $205,893.02. This work had been completed except furnishing certain shutters for the grandstand, of the contract price of $1000. *Record, pp.* 30, 62. It is submitted as a matter of fact that this was a substantial completion of the contract. Mathematically all but 1000/205,893 of the contract

price had been put into the structures; in other words the contract was more than 99-1/2% finished. The part uncompleted represented some shutters which were not essential to the use of the plant for the purpose designed, as is shown by the holding of a race meet before work under the contract was stopped. *Record, pp.* 26, 31. These facts being undisputed, the conclusion is as much for the court as a jury. That conclusion must be that the contract was substantially completed. No question of the Company's good faith is raised.

When the contract is substantially completed, the contractor is entitled to his lien. "This is an application of a rule of common law to suits for the enforcement of mechanics' liens."

Bergfors v. *Caron*, 190 Mass. 168.
Hobart v. *Reeves*, 73 Ill. 527.
Hankee v. *Arundel Realty Co.*, 98 Minn. 219.
Nolan v. *Whitney*, 88 N. Y. 648.
Phillip v. *Gallant*, 62 N. Y. 256.
McCue v. *Whitwell*, 156 Mass. 205.
Dyer v. *Lintz*, 76 N. J. L. 204.
Sherry v. *Madler*, 123 Wis. 621.
Kane v. *Stone Co.*, 39 Ohio St. 1.
Rockel on Mechanics' Liens, *s.* 49.
Horn v. *Batchelder*, 41 N. H. 86.
27 Cyc. 85.

> Substantial performance * * permits only such omissions or deviations from the contract as are inadvertent and unintentional, and are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price. *Spence* v. *Ham*, 27 App. Div. 379. N. Y.

Hall v. *Long*, 68 N. Y. Supp. 522, 524.

In speaking of this requirement it has been said:

> But this is not a technical rule. It does not apply to immaterial points but to the substantial requirements of the contract. If the work was substantially completed, then the plaintiff is entitled to recover as much as the materials and work were worth, as determined by the contract price.

Kane v. *Stone*, 39 Ohio St. 1.
Moore v. *Carter*, 146 Pa. St. 492.
Rockel on Mechanic's Liens, *s.* 49, 127.
Moore v. *Dugan*, 179 Mass. 153.
Horn v. *Batchelder*, 41 N. H. 86.
27 Cyc. 85.

2. The Club Breached the Contract by Refusing to Pay Instalments Due, and, by Reason of its Insolvency and Abandonment of the Contract Justified the Company's Action in the Premises.

It is found as a fact by the State Superior Court, (*Record, pp.* 52, 65), and by the Master, (*Record, p.* 30), that "the failure on the part of the Breeders' Club to make its payments under the contract constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract." These facts the District Court considered and accepted in formulating its decree declining "to independently consider and adjudicate the local lien question further than to accept as conclusive the result reached in the State Court." *Record, p.* 58. The Circuit Court of Appeals found as a fact that there "was no substantial variance between the proofs offered in the Superior Court and those afterward presented in the District Court" (*Record, p.* 63); that the Supreme Court held "that all the facts essential to

the creation and preservation of the lien had been found for the plaintiff in the Superior Court" (*Record, p.* 65); that the whole amount reserved by the contract was due and payable at the time suit was brought (*Record, p.* 62); and that the New England Breeders' Club was "hopelessly insolvent" and had abandoned the contract. (*Record, p.* 70).

In the case of an executory contract partially performed, several situations will warrant the promissor—the plaintiff—in treating the contract as breached by the other party; he may then cease to perform his part and seek an appropriate remedy.

Thus (1) insolvency of the defendant may justify such action, or (2) failure to pay instalments due under the contract, or (3) renunciation or abandonment of the contract by the defendant. These three situations are presented by the instant case. There are two other grounds, not here material, *viz.*, interference and prevention by the defendant or his voluntary disablement of performance.

1. In Elliott on Contracts it is said:

> While insolvency of itself is not a breach of contract and does not authorize rescission, there may be such an admission of the insolvency as amounts to a declaration of intention not to abide by the contract, and it may operate as a renunciation. 3 *Elliott on Contracts, p.* 226, citing:
>
> *In re Phoenix Bessemer Steel Co.,* L. R. 4 Ch. Div. 108.
> *Ex parte Stapleton,* L. R. 10 Ch. Div. 586.
> *McKenzie* v. *Weinnman,* 116 Ala. 194.
> *Freeman* v. *Topkis,* 1 Mar. (Del.) 174.
> *Dorman* v. *Weakly,* 39 S. W. 890. (Tenn.).
> *Hallacher* v. *Henlien,* 39 S. W. 869 (Tenn.).

The Circuit Court of Appeals for the Sixth Circuit declares by Mr. Justice Lurton: "Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance" *In re Neff*, 157 Fed. 57, 61.

Lovell v. *St. Louis Life Ins. Co.*, 111 U. S. 264, is another Federal case in point and an application of the principle is presented in *Bank Commissioners* v. *Trust Co.*, 69 N. H. 621, 623.

2. Failure to pay instalments due under the contract may amount to a renunciation by the defendant and justify cessation of work under the contract.

Freeto v. *Houghton*, 58 N. H. 100, 101.
Canal Co. v. *Gordon*, 6 Wall. 561, 569.
Thomas v. *Stewart*, 132 N. Y. 580, 582.
Woolf v. *Shaefer*, 103 N. Y. App. Div. 567.
Hall v. *Long*, 68 N. Y. Supp. 522.
Huetter v. *Redhead*, 31 Wash. 320.
Eastern Forge Co. v. *Corbin*, 182 Mass. 590, 593.
Johnson Forge Co. v. *Corbin*, 3 Penne. 342 (Del.)

This is entirely logical and just. The failure to pay an instalment may so cripple the contractor as to render it impossible to pay his help or purchase materials necessary for the continuance of work. Some such reason as this may be the foundation for the Master's finding that "the failure on the part of the Breeders' Club to make its payments under the contract constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract." *Record, p.* 30.

Yet, if the impossibility arises, directly, or

even indirectly, from the acts of the promissee, it is a sufficient excuse for non-performance. This is upon the principle that he who prevents a thing may not avail himself of the non-performance which he has occasioned. (*Dolan* v. *Rodgers*, 149 N. Y. 489, 491).

Vandegrift v. *Cowles Eng'r Co.*, 161, N.Y. 435, 443.

3. If the defendant repudiates or abandons the contract before its completion that "dispenses" the contractor from his part of the agreement. *Holt* v. *United Security Life Insurance Co.*, 74 N. J. L. 795, 801. This, of course, is elemental. The conflict—or rather discussion—for the doctrine is settled, comes when a remedy is sought by the contractor.

In *Hochster* v. *De La Tour*, 2 El. & B. 678, Lord Campbell enunciated the doctrine that is now accepted almost universally:

> If it should be held that, upon a contract to do an act upon a future date, renunciation of the contract by one party dispenses with the condition to be performed in the meantime by the other, there seems no reason for requiring the other to wait until the date arrives before seeking his remedy by action, and the only ground upon which the condition can be dispensed with seems to be the renunciation, which may be treated as breach of contract.

It is the firmly established law of the Federal forum, that in such a case the injured party may, if he desire, sue at once upon the contract and recover damages for the breach.

Roehm v. *Horst*, 178 U. S. 1.

Roehm agreed to purchase hops of Horst Bros. to be delivered in shipments at different times during five years. Roehm repudiated all liability for certain shipments before the time set for their de-

livery. Horst began his action before the date set for delivery. Mr. Chief Justice Fuller stated the question: "Where the contract is renounced before performance is due, and the renunciation goes to the whole contract and is absolute and unequivocal, the injured party may treat the breach as complete and bring the action at once." *p.* 8. In a lengthy and learned opinion where the conflicting doctrines are analyzed, the court holds "that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor (*p.* 19), and that the rule laid down in *Hochster* v. *De La Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day." *p.* 20.

In Wald's Pollock on Contracts, the question is thoroughly discussed and unqualified approbation expressed of the established rule, supported by many authorities, that the plaintiff may cease performance upon the defendant's repudiation, and yet sue upon the contract, *pp.* 351, 352 and notes. And, although not approving the reasoning of the cases, the author admits that it is the settled law of England, and Canada, and in the Federal Courts and a majority of the State courts, that the plaintiff in such cases has an immediate right of action, *pp.* 355, 361 and notes.

Cf. 3 Elliott on Contracts, sec. 2030.
O'Neil v. *Supreme Council*, 70 N. J. L. 410.

The doctrine of *Rochm* v. *Horst* was approved in *The Eliza Lines*, 199 U. S. 119, and has been followed and applied in the Federal forum continuously.

In re Neff, 157 Fed. 57.
McBath v. *Jones Cotton Co.*, 149 Fed. 383.
Michigan Yacht Co. v. *Busch*, 143 Fed. 939.
In re Stern, 116 Fed. 604.

In *Anvil Mining Co.* v. *Humble*, 153 U. S. 540,

the latter had a contract to mine all ore in certain parts of the Company's mine and was proceeding with the work when the Company interfered and prevented progress, thus breaching the contract. Plaintiff then abandoned further work and sued for damages on the contract; he was held justified in so doing, the court saying:

> Such an abandonment is not technically a rescission of the contract but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. *p.* 552.

In re Neff above, points out how the Federal courts in bankruptcy have applied the principle on the reasoning that "bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation." *In re Neff*, 157 Fed. 57, 61. Consequently claims are provable for damages for executory contracts breached by the bankruptcy.

> *Lovell* v. *St. Louis Life Ins. Co.*, 111 U. S. 264.
> *Carr* v. *Hamilton*, 129 U. S. 669.
> *In re Swift*, 112 Fed. 315.
> *In re Pettingill*, 137 Fed. 143.

That in case of breach of an executory contract, the injured party may at his election bring an action on the contract to recover damages for its breach or recover the value of the consideration furnished on a *quantum meruit* is the law in New Hampshire.

It is said:

> So, too, the authorities are clear, explicit and uniform, that where money has been paid, goods sold and delivered, or services rendered, upon a contract executory on the part of him who receives the money or goods, or for whom the services are performed, and he rescinds the con-

tract, or wholly fails to comply with its requisitions, or refuses to perform an essential part of the entire contract, the injured party, who has paid the money, sold and delivered the goods, or performed the services, has an election, either to bring an action upon the contract, to recover damages for its breach, or to consider the contract as rescinded, and bring his action of general *indebitatus assumpsit*, to recover back the money, or to recover the value of the goods sold and delivered, or of the services rendered. *Luey* v. *Bundy*, 9. N. H. 298, and authorities; *Deming* v. *Comings*, 11 N. H. 474; *Snow* v. *Prescott*, 12 N. H. 535; *Brown* v. *Mahurin*, *ante*, 156; *Pierce* v. *Duncan*, 22 N. H. 18; *Allen* v. *Webb*, 24 N. H. 278.

Drew v. *Claggett*, 39 N. H. 431, 433.

The doctrine is applied in a recent New Hampshire case involving the insolvency of a trust company. The company pledged real estate with trustees to secure payment of certain obligations and agreed to pay the necessary expenses incurred by the trustees in execution of the trust. The trust company became insolvent and the trustees filed claims for past and future expenses. It was held: "The insolvency proceedings disabled the defendants from performing the executory portions of their agreements in respect to these expenses, and the trustees are entitled to an allowance of reasonable damages for the breaches of contract thus occasioned." *Bank Commissioners* v. *Trust Co.*, 69 N. H. 621, 623.

The opinion of the Circuit Court of Appeals in the case at bar properly applied the doctrine of *Rochm* v. *Horst*. "The Club by its duly authorized officer, informed the Company that it was insolvent and would pay nothing; that it (the Company) must look to its lien to support its claim." *Record*, *p.* 70. Accordingly the Company abandoned the

undertaking and brought suit upon the contract forthwith. At this time, except for a matter of one thousand dollars, "the whole amount reserved by the contract was due and payable." *Record, p.* 62. This amount was $46,748.08 (being the judgment sum in the State courts), and included, with interest, notes of $28,000 which were over due. *Record, p.* 70. "It was determined in the suit in the State court that the sum of $46,748.08 had thus been earned, and was unpaid." *Record, p.* 62. The situation both as a matter of fact and of law entirely warranted the Master's finding that the Club was justified in not proceeding with the work.

The New Hampshire lien statute provides:

> SECTION 10. If a person shall * * perform labor or furnish materials * * for erecting or repairing a house or other buildings by virtue of a contract with the owner thereof, he shall have a lien thereon, and on any right of the owner to the lot of land on which the house, building or appurtenances stand.
>
> * * * * *
>
> SECTION 16. The lien created by sections ten, etc., shall continue for ninety days after the services are performed, or the materials or supplies are furnished, etc.
>
> *Public Statutes,* Chapter 141.

The Company had performed labor and furnished materials "by virtue of a contract with the owner," *i. e.*, the Club, and was properly adjudged a lien in accordance with the statute for an amount determined by the contract itself as a measure of the value of the services performed and materials or supplies furnished. The "damages" were "in the nature of a debt due under the contract." *McCue* v. *Whitwell*, 156 Mass. 206, 207.

The measure of recovery is the contract price, less a deduction for the work undone. The rule is the same wherever the contractor is the righteous party.

3 Sutherland on Damages, *p.* 2179.
2 Sedgwick on Damages, *p.* 1316.
Rockel on Mechanics' Liens, *p.* 127.
Hutt v. *Hickey*, 67 N. H. 411, 417.
Moore v. *Dugan*, 179 Mass. 153.
Sherry v. *Madler*, 123 Wis. 621.
Moore v. *Carter*, 146 Pa. St. 492.
Hall v. *Long*, 68 N. Y. Supp. 951.
McGrathy v. *Horgan*, 76 N. Y. Supp. 412, 415.
Burke v. *Coyne*, 188 Mass. 401, 404.
Norwood v. *Lathrop*, 178 Mass. 208, 210.
McCue v. *Whitwell*, 156 Mass. 205, 207.

The amount earned, payable and unpaid under the contract, determined by deducting from the contract price, the amount it would cost to complete the contract, plus what had been paid under the contract (*Record, pp.* 30, 31), measured very accurately the damages accruing to the Company by the Club's breach of contract. As the contract had been almost completed, the measure of damages for its breach, in an action on the contract, had been worked out correspondingly by the contract itself; the progress of the work automatically measured the damages. The facts of the case leave little room for the application of the principle that "the contract is made the rule of payment, so far as it can be traced" (*Wheeden* v. *Fiske*, 50 N. H. 125, 127), in computing the value of the work undone.

In *Charnley* v. *Honig*, 74 Wis. 163, it is said:

> If the contractor had completed the building according to the contract, no one would

> contend that he was not entitled to a lien if he had not been paid. How can he stand in a different position when he has completed it as far as the defendants would allow him, and he asks for the contract price, less the cost of finishing it. It would allow the defendants to take away from the plaintiff one of his statutory rights by a violation of their contract.

In any view of the case, however, the rule of damages is practically academic. By no conceivable rule would the Company, the righteous party, be entitled to less than the amount due and payable under the contract at the moment the Club breached it. With the entire sum of $205,893 earned except for $1000, it is apparent the variation among the reckonings of damages under any rules, will be *"de minimis,"* and if any reckoning be adverse to the Company in comparison with the rule applied, the Club may not object.

The Club, by its brief to be filed, will doubtless contend as it has hitherto in the various other tribunals contended, that its failure to make payments under the contract, or its insolvency and abandonment of the contract, did not excuse the Company from completing the contract; that to be entitled to a lien, the Company must have gone on after the Club's insolvency and finished the contract in full.

It is safe to assert that this position does not represent the law of the case, never did and never will. In effect it is an assertion that in the event of the owner's insolvency, the contractor to protect himself must continue to increase the debt to the full amount of the contract; that the contractor must perhaps make the plight of the other creditors and his own as well, very likely, worse; for the completed structure may be without market value, or be worth less than cost.

The theory of a builder's lien is equitable; he who creates the tangible value is entitled to its security for his debt. If the owner be solvent, the lien is of course, of no practical benefit; it is only valuable in cases of insolvency. To contend that where the owner becomes insolvent before the contract is completed, the contractor shall realize no lien although the law will give him a right of recovery for what he has done, either in an action on the contract or by *quantum meruit*, is to ignore the fundamental theory of a lien.

As a general proposition the laws relating to the enforcement of liens are given a liberal construction. *Trask* v. *Searle*, 121 Mass. 229; *Shaw* v. *Young*, 87 Me. 271; *Durling* v. *Gould*, 83 Me. 134; 20 Am. & Eng. Ency. of Law (2d ed.) 277, 373. This tendency is approved in the Federal courts. "The laws giving this class of lien should be liberally construed, so as to secure rights intended to be preserved;" *Morgan* v. *First Nat. Bank*, 145 Fed. 466, 472.

The logic of the Club's contention would place it in the owner's power, by refusing the contractor the opportunity to complete, to deprive the latter of any claim to a lien. It is perfectly obvious that the right to a lien does not and can not properly depend upon any act of the owner; given work done under a contract with the owner, the right to a lien must depend upon the good faith of the contractor if he comply with the technical requirements of the lien statute. If he complete the contract, or substantially do so in good faith; if he is able and willing to complete but is not permitted to do so by interference of the owner or the latter's insolvency or renunciation, none the less in any of these events he is entitled to his lien for the work done under the contract, either in an action on the contract or on a *quantum meruit*. Such is the law.

In short it may be stated as a general doctrine that wherever the contractor is justified in ceasing performance of an uncompleted executory contract, by reason of the owner's interference, failure to make payments, waiver, renunciation or repudiation of the contract, bankruptcy or voluntary disablement, he may cease work and at once bring an action either on the contract for damages or *indebitatus assumpsit* for the value rendered. In either event he is entitled to a lien judgment.

Freeto v. *Houghton*, 58 N. H. 100.
Howes v. *Reliance Wire Works Co.*, 46 Minn. 44.
Knight v. *Norris*, 13 Minn. 473.
Dennistoun v. *McAllister*, 4 E. D. Smith 729. (N. Y.).
Burke v. *Coyne*, 188 Mass. 401.
Smith v. *Wetmore*, 167 N. Y. 234, 239.
Brady v. *Oliver*, 125 Tenn. 595.
Baker v. *Waldron*, 92 Me. 17.
Woolf v. *Shaefer*, 103 App. Div. 567. (N. Y.)
Hall v. *Long*, 68 N. Y. Supp. 522.
Huetter v. *Redhead*, 31 Wash. 320.
McCue v. *Whitwell*, 136 Mass. 205.
Federal Trust Co. v. *Gingues*, 76 N. J. Eq. 495, 502.
South Fork Canal Co. v. *Gordon*, 6 Wall. 561.
Anderson v. McDonald, 31 Wash. 274.

3. The Club Waived Absolute Completion.

In the ultimate analysis, back of any question of substantial completion, or neglect to complete, default in payments due, or any one of the varied technicalities hitherto vainly offered by the Club in the various tribunals, lies the determinative fact, that Miller has been found to be "for the purposes

of this case, practically the corporation" (Club). *Record, p.* 69. And the Club, by Miller, deliberately, advisedly and in good faith (*Record, p.* 44) waived full completion of the contract, and informed the Company it must look to its lien to support its claim." *Record, p.* 70.

Legally then, the Company *did* complete the contract by the work done. Waiver of completion is a question of fact (*Danforth* v. *Freeman*, 69 N. H. 467; *Fuller* v. *Brown*, 67 N. H. 188) and that Miller *did* waive completion of this contract is found as a fact by the State Superior Court, the Federal Master and the Circuit Court of Appeals.

SUMMARY.

It is respectfully submitted that the Club has had its day in court, yea, in many courts; that all questions of fact have been fairly determined against it; that all questions of law which it has raised have again and again properly been held adversely to it. Miller *was* the Club; he, as the Club, waived completion of the contract; payments were due and unpaid under the contract; the Club was insolvent; it abandoned the contract and repudiated it. The Company justly and properly has prevailed. This appeal should be dismissed and the judgment of the Circuit Court of Appeals be affirmed. In equity and in law the Company is entitled to the lien judgment awarded it by the courts of New Hampshire nearly seven years ago.

ROBERT L. MANNING,
GEORGE H. WARREN,
of Counsel,
appearing specially for the
HEAD & DOWST COMPANY, *Appellee.*

HOBBS *v.* HEAD AND DOWST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 148. Argued December 18, 19, 1913.—Decided January 5, 1914.

Even though contractors may not be entitled to a mechanics' lien under the statute unless the contract be completed, they may be entitled thereto if absolute completion is waived, and in this case this court will not go behind the finding of the master followed by the court below that there was a waiver and the contractor was justified in stopping work.

Where the state trial court had upheld a mechanics' lien before the petition and the trustee in bankruptcy seeks in the Federal court to prevent the enforcement of the lien, this court will not go behind the state judgment because exceptions thereto had not been passed upon owing to the action of those representing the estate.

In this case this court is satisfied that substantial justice has been

done in enforcing a lien for over $45,000 admittedly due to the contractor but contested because about $1,000 of work remained uncompleted on a contract of $187,000, the contractors having ceased work after the owner of the building had failed in its payments and was hopelessly insolvent.

175 Fed. Rep. 501, affirmed.

THE facts, which involve the validity of a lien for labor and materials on property of a bankrupt, and the necessity for completion of the contract in order to maintain the lien, are stated in the opinion.

Mr. Henry F. Hollis for appellant:

The alleged lien has no legal standing under the statute. See N. H. Pub. Stats., c. 141, §§ 10, 16, 17.

The lienors are not entitled to a mechanics' lien because: They deliberately, willfully, and without legal excuse, failed to complete their contract; nothing is due and payable under said contract; the contract is entire and no way is provided to apportion non-lienable items.

All the mechanics' lien cases which are reported in New Hampshire reports are as follows and sustain this contention: *Jacobs* v. *Knapp*, 50 N. H. 71; *Bryant* v. *Warren*, 51 N. H. 213; *Cheshire Prov. Ins.* v. *Stone*, 52 N. H. 365; *Cole* v. *Colby*, 57 N. H. 98; *Freelo* v. *Houghton*, 58 N. H. 100; *Hill* v. *Callahan*, 58 N. H. 497; *Hale* v. *Brown*, 59 N. H. 551; *Eastman* v. *Newman*, 59 N. H. 581; *Marston* v. *Stickney*, 60 N. H. 112; *Foote* v. *Scott*, 60 N. H. 469; *Pike* v. *Scott*, 60 N. H. 469; *Hodgdon* v. *Darling*, 61 N. H. 582; *Pitman* v. *Thompson*, 63 N. H. 73; *Thompson Mfg. Co.* v. *Smith*, 67 N. H. 409; *Kendall* v. *Pickard*, 67 N. H. 470; *Quimby* v. *Williams*, 67 N. H. 489; *Lawson* v. *Kimball*, 68 N. H. 549; *Wason* v. *Martel*, 68 N. H. 560; *Lavoie* v. *Burke*, 69 N. H. 144; *Grafton Co.* v. *Company*, 69 N. H. 177; *Perrault* v. *Shaw*, 69 N. H. 180; *Cudworth* v. *Bostwick*, 69 N. H. 536; *Bixby* v. *Whitcomb*, 69 N. H. 646; *Russell* v. *Howell*, 74 N. H. 551.

A mechanics' lien is a creature of the statute, and can only be obtained by a strict compliance with the letter of the law. *Marston* v. *Stickney*, 55 N. H. 383; *Jacobs* v. *Knapp*, 50 N. H. 71, 80; *Bicknell* v. *Trickey*, 34 Maine, 273, 281; *Trask* v. *Searle*, 121 Massachusetts, 229; *Gale* v. *Blaikie*, 129 Massachusetts, 206; *Wendell* v. *Abbott*, 43 N. H. 68, 73; *Ellis* v. *Lull*, 45 N. H. 419; *Pierce* v. *Cabot*, 159 Massachusetts, 202; *Street Lumber Co.* v. *Sullivan*, 87 N. E. Rep. (Mass.) 905; *General Fire Extinguisher Co.* v. *Chaplin*, 183 Massachusetts, 375; *Grainger & Co.* v. *Riley*, 201 Fed. Rep. 901, 903; *Street Lumber Co.* v. *Sullivan*, 201 Massachusetts, 484; *Whalen* v. *Collins*, 164 Massachusetts, 146, 150; 20 Am. & Eng. Ency. Law, 2d ed., 269, 277; 27 Cyc. 20.

The lien was not recognized at common law. *Van Stone* v. *Company*, 142 U. S. 128, 136.

Under the New Hampshire and similar statutes, the lien suit must be based upon an express contract with the owner, in existence when the service is performed. It cannot be based upon a *quantum meruit*, or implied assumpsit. *Copeland* v. *Kehoe*, 67 Alabama, 594; *Rowley* v. *James*, 31 Illinois, 298; *Parker* v. *Anthony*, 4 Gray, 289; *Sanderson* v. *Taft*, 6 Gray, 533; *Sly* v. *Pattee*, 58 N. H. 102; *Pike* v. *Scott*, 60 N. H. 469; *Marston* v. *Stickney*, 60 N. H. 112; *Jacobs* v. *Knapp*, 50 N. H. 71, 78; *Dressel* v. *French*, 7 How. Pr. (N. Y.) 350; *Ellenwood* v. *Burgess*, 144 Massachusetts, 534.

In case there is an express contract, there can be no lien unless the claimant show one of three things: That he has performed the contract: *Rochford* v. *Rochford*, 192 Massachusetts, 231; *General Fire Extinguisher Co.* v. *Chaplin*, 183 Massachusetts, 375; *Rome Hotel Co.* v. *Warlick*, 87 Georgia, 34; *Thomas* v. *University*, 71 Illinois, 310; *Bohem* v. *Seabury*, 141 Pa. St. 594; *Moritz* v. *Larsen*, 70 Wisconsin, 569; *Company* v. *Berghoefer*, 103 Wisconsin, 359; *Cahill* v. *Heuser*, 2 N. Y. App. Div. 292; *Paturzo* v.

Shuldiner, 110 N. Y. Supp. 137; *Gunther* v. *Bennett*, 72 Maryland, 384; *Brick Co.* v. *Spilman*, 76 Maryland, 337; *Derrickson* v. *Edwards*, 29 N. J. Law, 468; *McGraw* v. *Godfrey*, 16 Abb. Prac. (N. S.) 358. That he has been prevented from doing so by the other party: *Howes* v. *Reliance Wire Co.*, 46 Minnesota, 44; *Knight* v. *Norris*, 13 Minnesota, 473; *Dennistoun* v. *McAllister*, 4 E. D. Smith (N. Y.), 729; *Kenney* v. *Sherman*, 28 Illinois, 520; *Charnley* v. *Honig*, 74 Wisconsin, 163; *Hutchins* v. *Bautch*, 123 Wisconsin, 394; *Catlin* v. *Douglas*, 33 Fed. Rep. 569; *Sproessig* v. *Keutel*, 17 N. Y. Supp. 839. That performance has been waived: *Cahill* v. *Heuser*, 2 N. Y. App. Div. 292; *Floyd* v. *Rathledge*, 41 Ill. App. 370; *McCue* v. *Whitwell*, 156 Massachusetts, 205; *Stewart* v. *McQuaide*, 48 Pa. St. 191; 20 Am. & Eng. Ency. (2d ed.), 366.

See also to the same effect *Hains* v. *Graham*, 111 S. W. Rep. (Ark.) 984; *Pippy* v. *Winslow*, 125 Pac. Rep. (Or.) 298; *Klaub* v. *Vokonn*, 169 Ill. App. 434; *Evans* v. *Woodley*, 138 N. W. Rep. (Mich.) 275.

The lienor willfully failed to complete the shutters, at an estimated expense of $1,000 and damage to that amount accrued thereby.

The completion of the contract was not prevented although it was somewhat delayed by the owner; performance of the contract was not waived.

The only excuse for the failure to complete the contract was failure of the owner to make its payments under the contract.

Breach by one party is no excuse for failure to perform by the other party. *Geary* v. *Bangs*, 33 Ill. App. 582, 584, 585; *Palm and Robertson* v. *R. R. Co.*, 18 Illinois, 217; *Kenney* v. *Sherman*, 28 Illinois, 520, 523; *West* v. *Bechtel*, 125 Michigan, 144; *Winchester* v. *Newton*, 2 Allen (Mass.), 492; *Dox* v. *Dey*, 3 Wend. (N. Y.) 356, 361; *M'Grath* v. *Horgan*, 76 N. Y. Supp. 412; *Osgood* v. *Bauder*, 75 Iowa, 550, 558; *Myer* v. *Wheeler*, 65 Iowa, 390; *Hanson* v. *Heat-*

ing Co., 73 Iowa, 79; *Bianchi* v. *Hughes*, 124 California, 24, 27; 3 Page, Contracts, § 1490 (7); *Mersey Co.* v. *Naylor*, 9 App. Cas. (H. of L.) 434; *Cox* v. *McLaughlin*, 54 California, 605; *Campbell* v. *McLeod*, 24 Nova Scotia, 66; *Mill Dam Foundry* v. *Hovey*, 21 Pick. (Mass.) 417, 435; *Howe* v. *Howe & Owen Co.*, 154 Fed. Rep. 820, 826; *Kauffman* v. *Raeder*, 108 Fed. Rep. 171, 181; *Paturzo* v. *Shuldiner*, 110 N. Y. Supp. 137; *Boon* v. *Eygre*, 1 H. Bl. 273 (Lord Mansfield).

Insolvency of one party is no excuse for abandoning work by the other party. *Pardee* v. *Kanady*, 100 N. Y. 121; *Vandegrift* v. *Cowles Eng. Co.*, 161 N. Y. 435; *Phenix Nat. Bank* v. *Waterbury*, 197 N. Y. 161; *Ins. Com.* v. *Ins. Co.*, 68 N. H. 51; *Bank Comm'rs* v. *Trust Co.*, 69 N. H. 621.

In New York this point has been considered and maintained more often than anywhere else. *N. E. Iron Co.* v. *Gilbert E. R. R.*, 91 N. Y. 153; *Devlin* v. *Mayor*, 63 N. Y. 8; *Merchant* v. *Rawson*, 1 Clarke Ch. (N. Y.) 123; *Underhill* v. *North Am. Co.*, 31 How. Prac. (N. Y.) 34; *In re Carter*, 47 N. Y. Supp. 383. See also *Hobbs* v. *Columbia Co.*, 157 Massachusetts, 109; *Jewett Pub. Co.* v. *Butler*, 159 Massachusetts, 517; *Lumber Co.* v. *Co.*, 89 Mo. App. 141; *In re Edwards*, 8 Ch. App. (Eng.) 289, 293; *McConnell & Drummond* v. *Hewes*, 50 W. Va. 33; *Brassel* v. *Troxel*, 68 Ill. App. 131.

For additional authorities recognizing this principle, see *Boorman* v. *Nash*, 9 B. & C. (Eng.) 145; Wald's Pollock on Contracts (3d ed.), 355, n. 88; Page on Contracts, § 1449, p. 2243; Benjamin on Sales, p. 808; *Lumber Co.* v. *Glasgow Co.*, 101 Fed. Rep. 863.

The owner did not refuse to make its payments under the contract.

The finding that the architect's certificate for $25,000 was given September 29th, is based on incompetent evidence.

Nothing is due under the contract. Under the express

terms of the contract, payments become due only upon the performance of certain unperformed conditions.

Nothing can be recovered under a contract until the contract has been complied with. *Robinson* v. *Crowninshield*, 1 N. H. 76; *Currier* v. *Railroad*, 34 N. H. 398; *Danforth* v. *Freeman*, 69 N. H. 466; *Wadleigh* v. *Sutton*, 6 N. H. 15; *Dame* v. *Woods*, 73 N. H. 222.

Nothing being due under the contract, no recovery can be had in the lien suit. 20 Am. & Eng. Ency. (2d ed.) 520.

As the creditor can maintain no action against the debtor until his demand is due and payable, he cannot until that time secure his lien by attachment. The cause of action and the perfected enforceable lien accrue to him at the same moment. *Kendall* v. *Pickard*, 67 N. H. 470; *Kihlburg* v. *United States*, 97 U. S. 398; *Martinsburg Co.* v. *March*, 114 U. S. 549; *Palmer* v. *Clark*, 106 Massachusetts, 373; *Chicago &c. Co.* v. *Price*, 138 U. S. 185; *Harmon* v. *Ashmead*, 60 California, 439; *Pitt* v. *Acosta*, 18 Florida, 270; *Thomas* v. *Turner*, 16 Maryland, 105; *Lauer* v. *Dunn*, 115 N. Y. 405; *Kinney* v. *Hudnut*, 3 Illinois, 472; *Preusser* v. *Florence*, 4 Abb. N. C. (N. Y.) 136; *Schroth* v. *Black*, 50 Ill. App. 168.

While as a general rule if there has been an honest endeavor to complete the contract, and substantial compliance with its terms, a lien may be enforced, 20 Am. & Eng. Ency., 2d ed., 366–367; 27 Cyc. 85, a willful omission in the performance of the contract, unless trivial, will preclude the assertion of a lien. 20 Am. & Eng. Ency. (2d ed.) 367; 27 Cyc. 85, n. 27; *Van Clief* v. *Van Vechten*, 130 N. Y. 571, 579; *Elliott* v. *Caldwell*, 43 Minnesota, 357; *D'Arnato* v. *Gentile*, 173 N. Y. 596; *S. C.*, 54 App. Div. 625; *Weeks* v. *O'Brien*, 59 N. Y. Super. Ct. 28; *May* v. *Menton*, 18 Misc. (N. Y.) 737; *Kohl* v. *Fleming*, 21 Misc. 690; *Fox* v. *Davidson*, 36 N. Y. App. Div. 159; *Spence* v. *Ham*, 27 N. Y. App. Div. 379; *Anderson* v. *Todd*, 8 N. Dak. 158;

Federal Trust Co. v. *Guingues*, 74 Atl. Rep. (N. J.) 652, 654; *Braseth* v. *State Bank*, 12 No. Dak. 486; *Wade* v. *Haycock*, 25 Pa. St. 382; *Gillespie Co.* v. *Wilson*, 123 Pa. St. 19; *Sherry* v. *Madler*, 123 Wisconsin, 621; *Roane* v. *Murphy*, 96 S. W. Rep. (Tex.) 782; *Hahn* v. *Bonacum*, 76 Nebraska, 837; *Gillis* v. *Cobe*, 177 Massachusetts, 584; *Burke* v. *Coyne*, 188 Massachusetts, 401; *Schindler* v. *Green*, 82 Pac. Rep. (Cal. App.) 341; *Smith* v. *Ruggeriero*, 173 N. Y. 614; *King* v. *Moore*, 70 N. Y. Supp. 6.

The architect's certificate was essential. 20 Am. & Eng. Ency., 2d ed., 370; 30 Id. 1205, 1237; Addison on Contracts, § 394; 27 Cyc. 87, n. 38; *Hanley* v. *Walker*, 8 L. R. A. 207; *Packard* v. *Van Schoick*, 58 Illinois, 79; *Coey* v. *Lehman*, 79 Illinois, 173; *Barney* v. *Giles*, 120 Illinois, 154; *Arnold* v. *Bournique*, 144 Illinois, 132; *Kirtland* v. *Moore*, 40 N. J. Eq. 106; *Wolf* v. *Michaelis*, 27 Ill. App. 336; *Provost* v. *Shirk*, 223 Illinois, 468; *Boots* v. *Steinberg*, 100 Michigan, 134; *Boden* v. *Mayer*, 95 Wisconsin, 65; *Forster Lumber Co.* v. *Atkinson*, 94 Wisconsin, 578; *Nesbit* v. *Braker*, 93 N. Y. Supp. 856; *Federal Trust Co.* v. *Guingues*, 74 Atl. Rep. (N. J.) 652, 656.

Where a contractor engages to do different kinds of work under the same contract for a lump sum, upon part of which he is entitled to a lien and the other part not, no lien attaches in his favor. *Libbey* v. *Tidden*, 192 Massachusetts, 175, 177; *Morrison* v. *Minot*, 5 Allen, 403; *Brewster* v. *Wyman*, 5 Allen, 405; *Graves* v. *Bemis*, 8 Allen, 573; *Getty* v. *Ames*, 30 Oregon, 573; *Allen* v. *Elwert*, 29 Oregon, 444.

For cases recognizing this general doctrine, see *Driscoll* v. *Hill*, 11 Allen, 154; *Angier* v. *Distilling Co.*, 178 Massachusetts, 163; *General Fire Extinguisher Co.* v. *Chaplin*, 183 Massachusetts, 375; *Evans Marble Co.* v. *Trust Co.*, 101 Maryland, 210; *McLain* v. *Hutton*, 131 California, 132; *Peatman* v. *Light & Power Co.*, 105 Iowa, 1; *Adler* v. *Exposition Co.*, 126 Illinois, 373; *McMaster* v. *Merrick*,

41 Michigan, 505; *Edgar* v. *Salisbury*, 17 Missouri, 271; *Sweem* v. *Railroad Co.*, 85 Mo. App. 87, 95; *Baker* v. *Fessenden*, 71 Maine, 292; *Rinzel* v. *Stumpf*, 93 N. W. Rep. (Wis.) 36; *Thompson Mfg. Co.* v. *Smith*, 67 N. H. 409, 410; *Grafton &c. Co.* v. *Company*, 69 N. H. 177; *Meek* v. *Parker*, 63 Arkansas, 367; *Baum* v. *Covert*, 62 Mississippi, 113; *Tumer* v. *Wentworth*, 119 Massachusetts, 459; *Harrison* v. *Ass'n*, 134 Pa. St. 558.

Mr. George H. Warren and *Mr. Robert L. Manning* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case arises upon a petition by a trustee in bankruptcy to prevent the enforcement of a lien for labor and materials in a state court. The proceedings in the state court were begun and had passed to a judgment in the Superior Court of New Hampshire, subject to exceptions, before the adjudication of bankruptcy. Afterwards the exceptions were overruled on technical grounds not touching the merits, the trustee in bankruptcy being heard at this stage. The action upon the matter in the courts of the United States will be seen in 169 Fed. Rep. 586, *S. C.*, 95 C. C. A. 84; 175 Fed. Rep. 501, and 184 Fed. Rep. 409, *S. C.*, 106 C. C. A. 519; a rehearing being denied upon the last decision in 185 Fed. Rep. 1006, *S. C.*, 107 C. C. A. 663, and an appeal to this court allowed in 191 Fed. Rep. 811, *S. C.*, 112 C. C. A. 325. The allowance of the appeal was correct. *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Greey* v. *Dockendorff*, *ante*, p. 513.

The Head and Dowst Company had agreed with the bankrupt to erect a grand stand, clubhouse, and other buildings and structures, for $187,644, and had completed the work, with the exception of shutters on the grand stand that would cost about $1000 to finish. At this point

it was told by the bankrupt of the hopeless insolvency of the latter and was informed that it must look to its lien to support its claim. Thereupon the company stopped work and began its lien suit. When the present attempt was made to reopen the matter, the case was sent to a Master who reported in great detail the facts just summed up and concluded that the Company was entitled to a lien for $45,995.02, exclusive of interest, that being the part of the contract price remaining unpaid, less $1000 for the shutters &c., and being also very nearly the same sum that was found due in the state court. The judge of the District Court thereupon dismissed the trustee's petition, and his decree was affirmed by the Circuit Court of Appeals. 175 Fed. Rep. 501, *sup.*

We shall consider such questions only as are sufficient to decide the case, omitting others that would have to be considered before the decree below could be reversed. The trustee argues that the failure to take the proper steps to get exceptions heard by the Supreme Court of the State on the merits constitutes an equitable ground for going behind the state judgment in order to defeat it by an objection of the most narrowly technical sort. The objection of course is that the contract was entire, and that whatever justification there may have been for stopping work, or ground for a *quantum meruit*, nothing short of complete performance would earn the contract price as such, or establish a lien for the same. It is argued in the same connection that the facts did not justify the Company in stopping work, but we shall not go behind the finding of the Master in this respect, followed as it has been, or say more than that, as we construe the facts and finding, it was quite right, and that putting on the last touches was waived.

We are of opinion that the decision was equally right. The case was tried upon its merits and decided in favor of the lien by the state court. The failure to get the

exceptions considered was due to no fault of the appellee, but solely to the conduct of those then representing the interests of the estate. It is a doubtful suggestion that an equity could be founded upon this. Certainly it is an inadequate ground for the intervention of equity to enforce forfeiture of a claim that could not be defeated, if at all, except by a most technical application of the law, and on the assumption that the state court did not know the law of the State. We shall not speculate upon that point, beyond saying that we see no reason to doubt that the state court was right, *Bergfors* v. *Caron*, 190 Massachusetts, 168, and cases in 27 Cyc. 85, 87, and 20 Am. & Eng. Encyc. of Law, 2d ed., 366–368, as we are satisfied that substantial justice has been done. Some subordinate matters of detail were argued but they do not seem to us to need mention; the whole strength of the case lay in the matter of which we have disposed.

Decree affirmed.

UNITED STATES v. MOIST.